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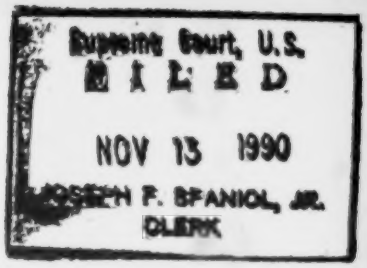

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1990

Silas V. Cross, Vernon Cross,
Petitioners,
v.
State of Washington;
Hon. Booth Gardner;
Brian Boyle, Commissioner of Public Lands,
[Washington State University its
board of Regents and Secretary],
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
for the Ninth Circuit

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QUESTIONS PRESENTED

1. Does the plain language of the Medicine Creek Treaty of 1854, Art. 6, incorporating by reference applicable provisions of the Omaha Treaty of 1854, Art. 6, prevent any court drawn inference that *permanent homes* allotted and patented land may be alienated or transferred in fee at the whim of the U.S. Government?

2. Does the understanding of the Medicine Creek Treaty Indian signers, which is of record herein, that their vested *permanent homes* patents allotments would be guaranteed incontinuous family or tribal possession and use forever by the U.S. government, negate any court drawn inference that a present power of "alienation" of vested allotted patented *permanent homes* land could be otherwise validly created by some Act of Congress?

3. Did the U.S. Congress by its Act of 1893 (27 Stat. 633) by a fair and reasoned interpretation there of intend that allotted, patented *permanent homes* land actually needed for homes would be impressed with a power of alienation after the passage of some 10 years?

4. Is the Medicine Creek Treaty *permanent homes* guarantee of such a character that it can not by any later statute inclusive of that of 1893 (27 Stat. 633) be modified or abrogated by virtue of its being a vested treaty right protected by the Fifth Amendment U.S. Const.?

5. Does the decision of the Court of Appeals over-reach and cloud the import of facts in the record on appeal so as to render the decision of the court insupportable on the facts of the case? [JUDICIS EST JUDICARE SECUNDUM ALLEGATA ET PROBATA (Dyer 12)]

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QUESTIONS PRESENTED

1. Does the plain language of the Medicine Creek Treaty of 1854, Art. 6, incorporating by reference applicable provisions of the Omaha Treaty of 1854, Art. 6, prevent any court drawn inference that *permanent homes* allotted and patented land may be alienated or transferred in fee at the whim of the U.S. government?

2. Does the understanding of the Medicine Creek Treaty Indian signers, which is of record herein, that their vested *permanent homes* patents allotments would be guaranteed in continuous family or tribal possession and use forever by the U.S. government, negate any court drawn inference that a present power of "alienation" of vested allotted patented *permanent homes* land

[1]. The Ninth Circuit Court of Appeals caption for this case is wholly incorrect to the extent that it: (1) includes "Pierce County" and Pierce County officials — "Sheldon Cook", "Patrick Kenney" and"Joe Stortini" as defendants who are not parties involved or of any interest in this case; (2) excludes "Washington State University, its Board of Regents and Secretary" which are the principal defendants in this case. See (R. Tr. 42) and (Appendix D p. A-22) with correct caption.

could be otherwise validly created by some Act of Congress?

3. Did the U.S. Congress by its Act of 1893 (27 Stat. 633) by a fair and reasoned interpretation thereof intend that allotted, patented *permanent homes* land actually needed for homes would be impressed with a power of alienation after the passage of some 10 years?

4. Is the Medicine Creek Treaty *permanent homes* guarantee of such a character that it can not by any later statute inclusive of that of 1893 (27 Stat. 633) be modified or abrogated by virtue of its being a vested treaty right protected by the Fifth Amendment U.S. Const.?

5. Does the decision of the Court of Appeals over-reach and cloud the import of facts in the record on appeal so as to render the decision of the court insupportable on the facts of the case? [JUDICIS EST JUDICARE SECUNDUM ALLEGATA ET PROBATA (Dyer 12)]

REFERENCES TO THE RECORD

Arrangements pursuant to S.Ct. Rule 12 have been made with the Clerk of the Ninth Circuit Court of Appeals to forward the entire original record to the Supreme Court. Transcripts (record of pleadings, motions, order, etc. filed originally with the U.S. District Court) are designated as (R, Tr).

OPINIONS BELOW

The memorandum opinion of the U.S. District Court for the W.D. of Washington is reproduced in Appendix C No. C88-410TB (W.D. Wash 1988) *infra* A-26.

The opinion of the Ninth Circuit Court of Appeals is reproduced in Appendix B hereto, *infra* p. A-16 and is numbered 89-35890.

JURISDICTION

The date of the judgment sought to be reviewed is Aug. 15, 1990,

The time of its entry by the Ninth Circuit of Appeals was Aug. 15, 1990.

The jurisdiction of the Supreme Court is invoked under the authority of 28 U.S.C. 1254 as implemented further by S.Ct. Rule 10.

The United States Supreme Court fully possesses the necessary jurisdiction subject to an exercise of its high judicial discretion to issue writ of certiorari as prayed for. The full context of this case is of special importance, even on a world wide basis, as it impacts directly with the total wholesale deprivation of previously U.S. government guaranteed Indian tribal nation *permanent homes* land otherwise secured and protected by solemn treaty with the U.S. government in 1854. This case involves a treaty time guaranteed vested right to a Medicine Creek treaty of 1854, Art. 6, provided for non-fee simple, *permanent homes* use and occupancy status in allotted land, in perpetuity, to all of the rightful descendants of all of the original *permanent homes* allottees. All but 600 acres of the "official" 18,000 plus acres of the Puyallup Indian tribal nation was duly allotted to original allottees for their use and occupancy *only*, as their *permanent homes* in 1881, and confirmed by the issuance of a Medicine Creek treaty provided for *permanent homes* patents in 1886. Thereafter all but 100 acres of this allotted, patented *permanent homes* land was caused by various illegal U.S. government implemented means and devices to pass out of the hands of rightful Puyallup Tribal Indian descendants into the hands of non-tribal persons allegedly as in a fee simple absolute status. Thus causing a wholesale displacement of Puyallup Indian tribal members who are the direct tribal descendants of the original Puyallup Indian allottees, from any present use and occupancy of their ancestral *permanent homes* land to their greatest of detriments, and an "eye sore" for the whole world to view. Further, the Court of Appeals in upholding the said deprivations of *permanent homes* land with respect to the Petitioner has decided the Medicine Creek treaty *permanent homes* issues in a way which most directly and severely conflicts

with certain decisions of this Supreme Court. These Supreme Court decisions are those which: (1) prescribe and require Indian treaty provisions to be interpreted to comport with their Indian signers' understandings at treaty time; (2) require that the legislative history attendant upon statutes affecting treaty Indians must be given effect to, as well as the required necessity of construing Indian treaty related statutes *in pari materia*; (3) hold that vested rights as well as Indian treaty vested rights, are constitutionally secured as non-abrogable by Amend. V, U.S. Const.

THE CONSTITUTIONAL PROVISIONS, TREATY AND STATUTES INVOLVED

United States Constitution

Article VI (Supremacy clause)
Amendment V (Vested Indian treaty right non-abrogable)

The treaty involved is known as the "Medicine Creek Treaty of 1854." It is published in 10 Stat. 1132, and is set forth in Appendix A, *infra* pp. A-1 — A-10 with Article 6 "Treaty with the Omahas of 1854" (10 Stat. 1043), *infra* pp. A-10-11.

Federal Statutes Involved are:

23 Stat. 76, 88-89 (Appropriation Act of July 4, 1884) Appendix A, *infra*, p. A-12.

27 Stat. 633 (Puyallup Indian Commission Act of March 3, 1893) Appendix A, *infra* pp. A-12,13 & 14.

33 Stat. 565 (Removal of Allotted Land Restriction Act of April 28, 1904) Appendix A *infra* p. A-14.

State Statute Involved is:

1890 Wash. Laws 499, (R.C.W. 64.20.010 (1966)). Appendix A, *infra* p. A-15.

STATEMENT OF CASE

1. Nature of claim; Federal Jurisdiction

This case began in the U.S. District court by Complaint of Petitioners for relief effectively in the form of ejectment. (R. Tr. 8). Petitioners pled a claim of superior right against Respondents to the possession, use and control of 30 acres of original treaty *permanent home* land, which was allotted to Petitioners' grandfather in 1881, and confirmed by a U.S. Presidential patent issued in 1886 pursuant to 23 Stat. 76, 88-89. The Court of Appeals found the district court possessed jurisdiction pursuant to 25 U.S.C. § 345.

2. Essential Facts

In 1881, by *"Certificate of Assignment"*, 80 acres of Puyallup tribal nation land was duly allotted to Petitioners' original family predessor, one "Pak-aw-wa-tish" or Jimmy Cross, as and for his and his tribally affiliated descendants' use and occupation as long as the same would continue. (R. Tr 42), (Appendix D, p. A-34). This was an allotment of an estate in land for use and occupancy only, for an otherwise perpetual duration, not one in fee simple, and was so guaranteed as such by the U.S. government at treaty time. This allotment was confirmed in 1886 by the U.S. President pursuant to the direct authority of Art. 6, Medicine Creek Treaty (Appendix A p. A-4), incorporating therein by reference *"applicable"* provisions of the Omahas Treaty of 1854 (Appendix A p. A-10) By the express terms of Art. 6 Medicine Creek Treaty of 1854 only regulatory provisions of Art. 6, of the Omahas were to be incorporated by reference. Those provisions which would destroy by fair interpretation or otherwise the U.S. guaranteed, and Indian treaty signers' understood character of their *permanent homes* status *in perpetuity* would and could not be *"applicable"* or understood as *"applicable"*. (R. Tr. 42), (Appendix D, pp. A-34-36).

By the plainest of language, Art. 6, Medicine Creek Treaty provides for *permanent homes* allotments subject to "applicable" regulations of Art. 6, of the Omahas treaty. Both district and appeals courts ignored the term "so far as the same may be applica-

ble" and treated matters as if all provisions, of the said Omahas Treaty of whatever nature, were incorporated into Art. 6, Medicine Creek Treaty, even though the doing of such effectively has operated to destroy U.S. guaranteed, and Indian treaty signers understood *permanent homes'* protections and status. (Appendix D).

By the plainest of legal terminology as held operative within Anglo-American laws of real property for centuries, Art. 6 of the Omahas Treaty incorporated as an applicable provision within Art. 6, of the Medicine Creek Treaty, expressly disallows any notions of a power of alienation (transfer of title in fee simple) being creatable under any circumstances. The said Art. 6 of the Omahas Treaty provides that the allotted land "...shall not be *aliened* or *leased* for longer than two years." (Appendix A p. A-11). This most important terminology is ignored by the district and appeals court in their decisions. (Appendix B; Appendix C). Instead both courts have insisted upon supplying the otherwise legally operative term of *"alienation"* in place of the term *"aliened* which in fact and law is nowhere to be found in, or logically inferred, from said treaty provision but instead is directly contradicted by the actual meaning of "aliened" in the context it is in, and especially in the surrounding circumstances with a sure emphasis on the Indian treaty signers' understanding that their *permanent homes* allotments would exist forever. "As long as the sun shines and the rivers flow". (Appendix D, p. A-41).

In 1937, one George Cross, an enrolled Puyallup Indian, and grand-son of Jimmy Cross purported to convey by deed of his own hand a fee simple absolute estate in 30 acres of the Cross family's *permanent home* allotted (1881) and patented (1886) land, which as early as 1893 with reference to 27 Stat. 633 (Appendix A, p. A-12) was deemed as land needed for "homes". Prior to the time of his conveyance, George Cross had fully abandoned his use and occupancy of said 30 acres and had actually removed himself from the Puyallup Indian Reservation. (R. Tr. 44), (Appendix E, p. A-47). This said conveyance, as argued now, as void

ab initio, was to one Ben Andre a non-Indian, who in turn conveyed the whole of what he believed to be his fee simple estate in said land to Washington State University, its Board of Regents and Secretary. (R. Tr. 44), (Appendix E). For a full exposition of the uncontested facts of this case, see full excerpt of facts section from Appellants' (Petitioners') Opening Brief to the Court of Appeals herewith. Cf. the full excerpt of Respondents' facts section from its Answering Brief to the Court of Appeals. (Appendix G and Appendix H respectively).

REASONS FOR GRANTING THE WRIT

1. Actually by the plain provisions applicable to Art. 6 Medicine Creek Treaty, (Appendix A, p. A-4) a power of alienation (transfer in fee) is not provided to *permanent homes* allottees/patented thereunder under any circumstances. Thus no treaty authority whatsoever existed for the U.S. government to presume to empower by statute Puyallup Indian allottee/patentees to sell or (alienate) any portion of their *permanent homes* land as allotted in 1881 (Appendix E pp. A-60-63) and patented to them in 1886, in severalty. In *Antoine v. State of Washington*, 420 U.S. 194, 199, 200, 43 L.Ed. 129, 95 S.Ct. 944 (1975), the principle and rule of application of Indian treaty interpretation is set forth:

> "The canon of construction applied over a century and a half by this Court is that the wording of treaties and statutes ratifying agreements with the Indians is not to be construed to their prejudice. *Worcester v. Georgia*, 6 Pet. 515, 8 L.Ed. 483 (1832). See also *The Kansas Indians*, 5 Wall 737, 760, 18 L.Ed. 667 (1867); *United States v. Kagama*, 118 U.S. 375, 30 L.Ed. 228, 6 S.Ct. 1109 (1886); *Choctaw Nation v. United States*, 119 U.S. 1, 28, 30 L.Ed. 306, 7 S.Ct. 75 (1866); *United States v. Winans*, 198 U.S. 371, 380-381, 49 L.Ed. 1089, 25 S.Ct. 662, 675, 56 L.Ed. 941, 25 S.Ct.662 (1905); *Choate v. Trapp*, 224 U.S. 665, 675, 56 L.Ed. 941, 32 S.Ct. 565 (1912); *Menominee Tribe v. United States*, 391 U.S. 404, 406 n 2, 20 L.Ed. 697, 88 S.Ct. 1705 (1968). In *Choate v.*

> Trapp, supra, also a case involving a ratifying statute, the Court stated: 'The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith.' *Morton v. Ruiz*, 415 U.S. 199, 236, 39 L.Ed. 2d 270, 94 S.Ct. 1055 (1974). Thus, even if there were doubt, and there is none, that the words '[t]o carry into effect the [1891] agreement,' in the 1906 Act, and the words 'ratifying the [1891] agreement,' in the 1907-1911 laws ratified Art. 6, application of this canon would require that we construe the series of statutes as having ratified that article."

It may be dramatically noticed that the Court of Appeals decision herein conveys the distinct ruling that the Washington State Legislature simply by adopting Wash. Laws of 1890, 499 (Appendix A p. A-15) could directly empower Puyallup Indian *permanent homes* allottees/patentees to alienate (transfer in fee) their holdings as opposed to *aliening* or *leasing* the same for over two years when the U.S. Congress had consented to the removal of the two restrictive conditions (restrictions) which when removed would expressly authorize *permanent homes* land to be: (1) aliened for over two years (but not alienated), and (2) leased for over two years, as plainly provided for by the incorporative device in Art. 6, Medicine Creek Treaty (Appendix A p. A-4). In full contemplation of fixed real property common law principles pertaining to legal terminology as used in documents creating interests in real property, there appears a vast legal difference and effect between the term *"aliened"* and the term *"alienated"*. The restrictive conditions that are involved as provided for in the 6th Article, Treaty with the Omahas (Appendix A. p. A-10) as incorporated by reference into the 6th Art. Medicine Creek Treaty state:

> "[C]onditioned that tract shall not be *aliened* or *leased* for longer than two years."

The term "aliened" in this context could hardly by the barest

of fair interpretation be equated with the precise term *"alienation"*. There is indeed a difference between the terms *alien* and *"alienate"*. Where as land may be aliened (some interest in land other than a *fee* interest transferred) for under two years, it would be highly contradictory to say that land may be *alienated* (a *fee* interest in land transferred *forever*) for under two years. The term "alienate" has a technical legal meaning. It is particularly applied to *absolute* conveyances of real property. *Conover v. Mutual Ins. Co.* , 1 N.Y. 290, 294. Any transfer of real estate short of a conveyance of title is not an *"alienation"* of estate. *Masters v. Insurance Co.*, 11 Barb N.Y. 630. However transfers of real estate interest short of conveyances of title can with legal precision be said to be *aliened*. This term is considerably definable more generally than the term *alienate*. Alien basically means to *transfer* or make over to another. "Commentary on Littleton by Sr. Ed.Coke", p. 1818, Cowells Law Dictionary. Case law precedent of great value useful to define the actual common law meaning of the word or term "alien" is *Krider v. Lafferty*, 1 Wharton 303, 314-415 (Pa. 1836). It is declared:

> "It is perfectly clear then, from the authorities on this subject, as well as from the very structure of a deed conveying land, when the words "enfeoff, give, grant, *alien*, bargain, sell, demise, let," &c. or any of them are used, that it is not to express or to designate in the slightest degree, the quantity of estate intended to be conveyed, but merely for the purpose of passing from the seller to the purchaser, the estate therein described, by other words introduced specially for that end, giving to it, either the character of a fee simple, fee tail, term for life or lives, or for years: as for instance, it if be a fee simple that is intended to be transferred, the words "his heirs," must be inserted immediately after the name of the purchaser, for they and they alone, are sufficient to make it such according to Littleton, sec. 1." (Emphasis added.)

It may be noted that the term *"alienate"* is not included or inclu-

sive of those words merely signifying a transfer of whatever estate or interest is being conveyed for the reason that "alienate" precisely means an absolute conveyance in fee whereas any transfer of real estate less than that is not *per se* an "alienation" (*Masters v. Insurance Co.*, supra) though it is properly an "aliening" of the same.

In no event does the 6th Article Treaty with the Omahas authorize or provide for *alienation* of *"permanent homes"* patented allotments. Any premise to the contrary is completely wrong. By its plain literal wording "aliening" and "leasing" for over two years is restricted, not "alienation" for over two years. A prohibition or condition against alienation for over two years is a contradiction in terms. Whereas the same against aliening for over two years is not. It is obviously quite contradictory to say that one may absolutely forever transfer title in land but for only under two years. The latter time quantum being in stark contradiction to the former time quantum of "forever." In any event as pronounced with certainty in *Krider v. Lafferty*, supra, the term "alien" (as opposed to "alienate") will not suffice to determine the quantum of estate.

To construe the term "aliened" to mean the same as "alienated", especially in its context within the 6th Art. Medicine Creek Treaty by incorporation through qualified reference[2] does *violence* and *prejudice* to the Indian treaty signers and their tribal descendants reserved, vested, and U.S. government guaranteed right to a *permanent home* land with *permanent homes* therein forever. The Court of Appeals, it appears has callous-

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[2]Art. 6 Medicine Creek Treaty (Appendix A p. A-4) in pertinent part provides: "...[H]e may...cause...lands hereby reserved...to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a *permanent home*, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, *so far as the same may be applicable.*" (Emphasis added).

lously ignored this result, and the principles enunciated by the Supreme Court which if applied avoid the resulting gross injustice and high breach of treaty contract.

2. It was the clear understanding of the Indian Treaty signers, and for that matter the understanding of U.S. government treaty representatives also, that *permanent homes* allotments were to be made to those heads of families who were inclined to undertake farming and agriculture as a way of life. And most importantly it was clearly understood by the treaty making participants on both sides that *permanent homes* allotments were to be for use and occupancy only and forever "As long as the sun shines and rivers flow", (Appendix D p. A-41) in order to insure that succeeding generations of Puyallup Indians would have the same privilege in the use and occupancy of allotted land as their direct ancestors may have had. (R. Tr. 42), (Appendix G, p. 11). It is made sufficiently clear through combined tedious efforts of David Getches, Daniel M. Rosenfelt, and Charles Wilkinson contained in their textbook entitled *"Federal Indian Law"* (West Publishing Co. (1979)) that *prior* to the 1880's unless otherwise specially provided for it was the recognized state of affairs that treaty Indian tribes owned title to all of their tribal nation territory and individual tribal members at most where appropriate, owned use and occupancy interests only. The Dawes Act of 1887, known as the "General Allotment Act" of 1887 (24 Stat. 388) effectively changed this state of affairs most clearly with respect to tribal land allotments in severalty which came after the passage of the Dawes Act. The allotment and patent therefor in this case was made in *1881* by "Certificate of Assignment" (Appendix D, p. A-24-28), and by *1886* "Permanent home" patent (Appendix F) respectively. It is set forth in said *"Federal Indian Law"* textbook at p. 70:

> "On the other hand, the allotment system was to enable the Indian to acquire the benefits of civilization. The Indian agents of the period made no effort to conceal their disgust for tribal economy...

> But voices of doubt were here and there raised about allotment as a wholesale civilizing program, "Barbarism" was not without its defenders...
>
> A minority report of the House Committee on Indian Affairs in 1880 went so far as to state that Indians made progress only under communism.
>
> At this point...friends and enemies of allotment alike showed no clear understanding of Indian agricultural economy. Both were prone to use the word 'communism' in a loose sense in describing Indian enterprise. It was in the main an inaccurate term...Agriculture was certainly but rarely a communal undertaking. What the allotment debaters meant by communism was that *the title to land invariably vested in the tribe and actual holding of the land was dependent on its use and occupancy.*

The italicized statement describes the exact situation contemplated and understood by the Indian treaty signers in 1854, as also understood by the U.S. government, which did, consistent with the 6th Article Medicine Creek Treaty, make express Certificated assignments or allotments of land to Puyallup Indian individuals and families in 1881; confirming these very same as use and occupancy interests with the tribal nation title thereto in trust with the U.S. government. As further confirmed by issuance of coextensive *permanent home* patents in 1886. Legally speaking of course this was deemed most propitious to the Puyallup Indian allottee/patentees because just one year later their land could have been trust patented to them by the then dreaded terms of the "General Allotment Act" of 1887. The Puyallups had escaped a possibly Constitutional correct Indian land allotment policy by just one Year. After the 6th Article Medicine Creek Treaty *"permanent home"* patents were issued in 1886, no later statutory enactment could operate as an abrogation of the familial *vested* interests provided for thereunder for an ongoing present privilege of use and occupancy forever.

The case of *Tulee v. State of Washington*, 315 U.S. 681, 684,

685, 62-S.Ct.862-, 86 L.Ed. 1121 (1942) declares the precise rule of both Supreme court responsibility in regard to, and the effect to be given, the express terms of Indian treaty provisions:

> "It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council and in a spirit which generously recognized the full obligation of this nation to protect the interests of a dependent people. *United States v. Kagama*, 188 U.S. 375 384, 30 L.Ed. 228, 231, 68 S.Ct. 1109; *Seufert Bros. v. United States*, supra (249 U.S. 198, 199, 63 L.Ed. 558, 559, 39 S.Ct. 203)."

In reaching the foregoing ruling the *Tulee* court explained the importance of the evidence of the Indian treaty signers intention as set out in the *"record"* before it thusly:

> "From the report set out in the record before us of the proceedings in the long council at which the treaty agreement was reached, we are impressed by the strong desire the Indians had to retain the right to hunt and fish in accordance with the immemorial customs of their tribes."

It is clear from the Court of Appeals decision in this case (Appendix B) that no application of the foregoing *Tulee* higher rule of precedent was ever undertaken by the court notwithstanding the unassailed record of the Indian treaty signers understanding of the terms relating to *"permanent homes"* mentioned and provided for in Art. 6, Medicine Creek Treaty. (Appendix D) and (Appendix E).

Just what *"permanent homes"* would be as viewed from the U.S. government position in 1854 is further amplified by Professor Felix Cohen in his original *"Handbook of Federal Indian Law"* (Univ. of N. Mex. Press 1942 pp. 45-46) wherein he observes:

> "A few treaties, however, make explicit and emphatic the assurance that state laws will not be applied to the Indians. These clauses are usually found in treaties with tribes that have sad experiences with state jurisdiction, and the inten-

> sity of Indian feeling on the subject is sometimes reflected in the language of the treaty. Thus the purpose of the Treaty of May 6, 1828, with the Cherokee Nation is stated to be the securing to the Cherokee migrating westward of '...a *permanent* home, and which shall, under the most solemn guarantee of the United States, be, and remain, theirs forever — a home that shall never, in all future time, be embarrassed by having extended around it the lines, or placed over it the jurisdiction of a Territory or State, nor be pressed upon by the extension, in any way of any of the limits of any existing Territory of State.' "

Prior to the time of the Medicine Creek Treaty of 1854 the United States government had undertaken numerous Indian treaty arrangements with bands, tribes, tribal nations on both sides of the Mississippi River. In so doing when it was clearly understood by both the tribe involved and the U.S. government that allotments were to be provided in fee simple absolute estate this would be expressly spelled out, leaving no room for future doubt or mistakes. E.g. Treaty with the Choctaw, 1825 (7 Stat. 234) provides in Article 4 thereof:

> "...It is therefore, hereby agreed, that all who have reservations in conformity to said stipulation [one square mile] shall have power, with the consent of the President of the United States to sell and convey the same *in fee simple*" (Emphasis added)

Treaty with the Senecas, Shawnees, etc. 1831 (7 Stat. 351) provides:

> "In consideration of the cessions...The United States will grant by *patent in fee simple* to them and their heirs forever, as long as they shall exist as a nation and remain in the same, a tract of land to contain sixty thousand acres..." (Emphasis added.)

Thus it can be seen that when the U.S. treaty representatives, prior to 1854 were prevailed upon by certain tribes east of the Mississippi to agree to allot their land to them in fee simple the treaties

expressly reflected this understanding of the tribes involved.

Thus it is easy to conclude that "permanent home" meant just that in 1854 and not only for an eventual or temporary time as the Court of Appeals by its decision now espouses. The Indian treaty signers as well as U.S. treaty representatives could have only understood that tribal nation reserved land was to be under the domain and control permanently of the Indians no matter what the later circumstances brought about would be, and that the *"permanent homes"* allotments were to be vested in severalty in Indian farming families to the extent of their continuous use and occupancy only.

Whether the 6th Art. Medicine Creek Treaty provided for *"permanent home"* patent was a restricted fee patent or not was clearly decided in the 1890's, *Eells v. Ross*, 64 Fed. 417 (9th Cir. 1894), held to the contrary by expressly overruling *Ross v. Eells*, 56 Fed. 855 (C.C. Wash. 1893) wherein the trial court had erroneously held that said Puyallup Indian trust patents were "restricted fee" patents. Thereby laying to rest any contention that the Puyallup Indians *permanent homes* patents were "restricted fee" patents. In so doing the *Eells v. Ross* appeals court decision makes clear what is the most insistent and dominant purpose of the 6th Art. Treaty with the Omahas' most applicable provision:

> "The patent has clear words of prohibitions against alienation, and even if it had omitted them, the treaties and law imposed them. The treaties with the Indians; the allotment of the land, in severalty — all had their purpose *of fixing them in permanent homes*. By Article 6 of the treaty, the privilege of allotment can only be availed of by those who will locate on the same as a permanent home *and the purpose is so careful, insistent and dominant* that the President is given power to —
>
> 'Prescribe such rules and regulations as will insure to the family in the case of the death of the head thereof the possession and enjoyment of such permanent home *and he may issue a patent only to such person or family who has made*

> a location for a permanent home and if issued may cancel it if such person or family "rove from place to place," and the tract may be declared abandoned and thereafter assigned to some other person of family.' "
>
> From its relations to the title, and from the terms of the treaty, we think the government had the power to make such conditions..." (Emphasis added.)

The Court of Appeals now in 1990 completely ignores its own settling of this issue in 1894 by *Eells v. Ross*, and refuses to come to grips with this realization. It may be noted with precision that the *Eells v. Ross* appeals court in finding no "restricted fee" patent was created holds that by the *permanent homes* patent and Art. 6 Medicine Creek Treaty there are *"clear prohibitions"* against *"alienation"*, not just merely that there are *"restrictions"* against the same. As stated above herein the *"restrictions"* are those against *aliening* and *leasing* for longer than two years. *Eells v. Ross* makes clear than an absolute prohibition against alienation of *permanent homes* land otherwise exists.[3]

Moreover, Professors, David Getches, et al in their forward to their text book *Federal Indian Law*, supra, at p. XXI explain consistent with the brilliantly applied absolute axiom of the *Tulee* case in the "Judge Boldt Decision", *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash 1974) as based upon *Tulee v. Washington*, supra, that:

> "Treaties and agreements which expressly reserve rights to Indians — even outside reservations — *are read to fulfill ancient promises as Indians would have understood them.* When Northwest Indians, whose livelihood and culture was based on fishing, retained the right to fish 'in common with all citizens' they could not have been bargaining away more than a right for non-Indians to take half of the resources which were available to Indians. Thus, Indians necessarily

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[3]It should be noted here that 6th Art. Treaty with the Omahas does expressly allow for the *sale* of "residue" or surplus lands only. By definition this land is not however allotted *permanent homes* land.

> have a right to attempt to harvest up to 50% of the salmon and steelhead from many of the nation's greatest fishing waters including much of the Pugest Sound and the Columbia River" (Emphasis added).

The "Judge Boldt decision" in direct reliance upon the *Tulee* case upheld on appeal in *United States v. Washington*, 520 F.2d 676 (9th Cir. 1976), thus illuminated the path the Court of Appeals should be obliged to follow in interpreting again the Medicine Creek Treaty of 1854 although another Article thereof, but just the same an Article with the same *solemn* United States guarantee attached to it to sustain and protect the Puyallup Tribe's Indian members in the complete possession, and control of their allotted/patented lands until the end of time. *"So long as the sun shines and the rivers flow."* (Appendix D p. A-41). This U.S. government guarantee would be illusory if future tribal descendants of the original allottees are to be deemed landless through unauthorized extreme acts of *permanent homes* land *alienations* by individual allottees/patentees in being who would be acting under the influence of avarice, threats, duress, trickery, deceit, and illegal *local* property taxations (Appendix E p. A-57). The Indian treaty signers and Puyallup Indians present at treaty time could hardly be said to have understood that this would be the disastrous effect of Art. 6 Medicine Creek Treaty of 1854 incorporating as it expressly does only those provisions of Art. 6 Omahas treaty *"so far as the same may be applicable"*, to obviously sustain a *permanent home* land with *permanent homes* for tribal individuals and their families and their tribal descendants *in perpetuity.*

3. The Puyallup Land Commission Act of 1893 (27 Stat. 633) (Appendix A, pp. A-12, 13 & 14) by its very terms, import and scope deals solely with Puyallup Indian *"permanent homes"* allotted and, (previously allotted under the terms of Art. 6 Medicine Creek Treaty, in 1881, with patents therefor issued in 1886) *"not needed for homes."* This Act does not permit or authorize

under any circumstances *alienation* (transfer or conveyance of a title in fee) of Puyallup land previously allotted and patented as *needed for homes*. The word "alienation" is superimposed on the treaty situation by the 1893 Act (27 Stat. 633) but only so far as land "*not* needed for homes" is concerned. All of the *permanent homes* allotted/patented lands of the 80 acres to Jimmy Cross, Petitioners' direct ancestor, was never in a category of allotted land "not needed for homes" under the said 1893 Act. (Appendix D, p. A-58).

The factual scheme underlying the applicability of 27 Stat. 633 was based upon the consensual designation by Indian allottees (as opposed to the tribe) of those portions of their allotted permanent homes land which they wished sold by the Puyallup Indian Commission (referred to in 27 Stat. 633) for their benefit. The purported removal of a non existent restriction on alienation of this land as *"not needed for homes"* only was authorized by the terms of 27 Stat. 633. This would be the only land, i.e. land *not* needed for homes, selected for the requisite appraisal to insure that Indian allottees were actually protected price and bargain wise. However it would be in the inherent nature of things that not all of this land so selected for appraisal and so appraised would in turn be selected for actual sale. The Act (27 Stat. 633) makes clear that one possible substantial impediment to actual sale after selection and appraisement was the necessary grant of, or refusal of, approval by the Secretary of the Interior for whatever reason. Obviously by the terms of the Act the Commission under the Act would not even select, let alone appraise these allotted land *needed for homes* as determined by an allottee/patentee, as it stated it could and would do so only with respect to allotted land as *not needed* for homes. Allotted land *needed* for homes would remain protected and unaffected as shown by the legislative history of the Act. This 1893 Act of Congress (27 Stat. 633) indeed has a certain profound legislative history which this court has said would in effect be given great weight. In *Rice v. Rehner*, 463 U.S. 713, 732, 733, 77 L.Ed. 2d 961, 103 S.Ct. 3291, (1983)

the court declared:

> "More important we have consistently refused to apply...a canon of construction when application would be tantamount to a formalistic disregard of *Congresional intent*....In the present case, Congressional intent is clear from the face of the statute and *its legislative history*" (Emphasis added.)

This determinative legislative history attendant upon the passage of the said 1893 Act (27 Stat. 633) is found in *Cong. Rec.* of 1892 p. 7193 with the propenent of the bill, U.S. Senator Allen of Washington State in the record clearly stating that some 5,000 plus acres representing allotted/patented *permanent homes* land as *needed for homes* would not be enscoped within the Act. He said:

> "The Indians being in this position, have expressed a desire and asserted the right to deal with their property as other citizens. Although they have been upon this reservation for nearly forty years, it is a fact that but 1,800 acres of the reservation have been nominally cleared; it is a fact that if either the Senate bill or the substitute which I propose to offer should be enacted into a law, *these Indians would retain beyond the power of alienation and free from all taxation nearly 5,000 acres of their land*, more than three times the quantity they have cleared in almost half a century. So then if they make the same progress in the next half century that they have in the past, you can expect that they will no more than clear and utilize 5,000 acres. *That is left untouched both by the bill of the committee and the substitute which I propose to offer.*" (Emphasis added.)

Petitioners' contentions in this regard are thusly emphasized: By the express terms of the said 1893 Puyallup Land Commission Act (27 Stat. 633), allotted/patented land *not needed for homes* were to be selected and sold to non-Indians who were intent upon developing land around Tacoma, Washington to conform with their economic and cultural motives and purposes. Absolute treaty prohibitions against alienation with respect to these allotted *per-*

manent homes lands which were *"not needed for homes"* were to be unlawfully disregarded as soon as possible after land Commission action and Secretary of the Interior approval notwithstanding no treaty authorization for the same existed. In fact Art. 6 Treaty with the Omahas authorizes the sale of only certain lands. These are as stated:

> "And the *residue* of the land hereby reserved, or of that which may be selected in lieu thereof, *after all* of the Indian persons or families shall have had assigned to them *permanent homes*, may be sold for their benefit..." (Emphasis added.)

By direct implication the congressional intent was that allotted land *not needed for homes*, but not selected for sale, could nonetheless be sold under the terms of the said 1893 Act after the passage of ten years. The phrase in the said Act which explains this is:

> "That the Indian allottees *shall not* have the power of alienation of the allotted lands not selected for sale by said commission for a period of ten years from the date of passage of this Act..." (Emphasis added.)

The words *"shall not"* obviously operate to diminish or foreclose that which was already Congressionally empowered (not create a new power). The only power that could have been so created was an express positive power to sell allotted land *not needed for homes*. (The Cross family allotted/patented land has always been "needed for homes.") The very subject of the 1893 Act is precisely that and most obviously nothing else. This subject of land *not needed for homes*, by this Act occupies the entire intent and scope of the discernable Congressional thrust and intent of the Act. Clearly Congress should not be held to have made every effort to protect the Puyallup Indians with respect to land *not needed for homes*, but agreed to "throw them to the wolves" after 10 years with respect to the very land they needed for homes for sustaining their lives and those of their children and their descendants. Additionally the terms of the 1893 Act have no applicability whatsoever to the allotted *permanent home* land of 80 acres, treaty

given into the use and occupancy of Jimmy Cross and his direct tribal descendants. This is so for the reason that the requisite element of consent to make this Act (27 Stat. 633) operative, under any interpretation, was never given by Jimmy Cross, the original allottee, or any of his tribal descendants in *actual possession*, *use*, and *occupancy* of said allotment including the Petitioners herein. To fully explain this conclusion the pertinent Land Commission action, and consent section of the 1893 Act need only to be set out *verbatim* for the court's review. It provides:

> "...[A]nd no part of the allotted land shall be offered for sale until the Indian or Indians entitled to the same shall have signed a written agreement consenting to the sale thereof, and appointing said Commissioners or majority of them trustees to sell said land and make a deed to the purchaser thereof..."

This provision of the 1893 Act was never implemented in the purported sale by George Cross II in 1938 to one Ben Andre (Appendix E, p. A-48-49), thus on this ground alone making the transfer void. See *Oneida v. Oneida Indian Nation*, 470 U.S. 226, 84 L.Ed. 2d 169, 105 S.Ct. 1245 (1985) which enforced the Nonintercourse Act of 1793 (1 Stat. 330, § 8). This Act provides in pertinent part:

> "No purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United Stated, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the constitution...[and] in the presence, and with the approbation of the commissioner or commissioners of the United States appointed to supervise such transaction."

Clearly as the record shows the 30 acre parcel of allotted/patented *permanent home* land claimed by Petitioners for their present use and occupancy as against Washington State University was never conveyed in conformity with the immediately above quoted provision of the 1893 Act (27 Stat. 633) and compels there-

fore the substantive (as opposed to the remedial basis) for *Oneida*, supra to applied herein with equal force and effect.

4. Should the 1893 Act (27 Stat. 633) (as confirmed only by 33 Stat. 565 (1904), without adding even one wit of authorization to the 1893 act, see *United States v. Washington*, 496 F.2d 620 (9th Cir. 1794)) be deemed to apply to allotted land as needed for homes it should be considered that: after the *6th Article Medicine Creek Treaty "permanent home"* trust patents were issued in 1886, no later statutory enactment could validly issue in abrogation of the *vested* interests provided for thereunder to Indian families, as qualified, forever to the use and occupancy of *permanent homes* allotted land. See *Choate v. Trapp*, 224 U.S. 665, 56 L.Ed. 941, 32 S.Ct. 565 (1912), confirming that rights vested by Indian treaties or statutes can not be adversely affected by later statutory enactments without violating the Fifth Amendment, U.S. Const. The rule of *Choate v. Trapp*, supra, has been authoritatively expounded upon in the "Federal Indian Law" handbook of 1958 published by the U.S. government Printing Office under the supervision of the Department of Interior. At page 843 thereof in footnote 3, it is stated:

> "That decision, *[Choate v. Trapp]*, which dealt with taxation of [Indian allotted] land...established a limitation on the exercise of so called plenary power by Congress in Indian Affairs. While the United States Government, in the exercise of this plenary power over Indian tribes, can amend or repeal any statute, treaty, or agreement by enacting a subsequent statute, *it cannot arbitrarily destroy or divest actually existing individual property rights acquired under a former statute or agreement*." (Emphasis added.)

In *Choate v. Trapp*, supra, it was held that the statute expressly provided for restriction on alienation during the U.S. government trust period, could be advanced without an abrogation of a vested right, thus making it possible for an already provided for patent in fee to issue sooner rather than later. This situation is

however entirely different from Petitioners' cause and claims because no "alienation" is possibly provided for in the first instance for the main reason that the Indians understood that their allotted *permanent homes* land would be for use and occupancy forever, in order to insure a succession thereto by succeeding generations of Puyallup tribal family descendants. See also *Fletcher v. Peck*, 10 U.S. (6 Cr.) 87 (1810) wherein the court held rights vested under prior acts cannot be divested.

Accordingly a decisional result that some federal statute enacted subsequent to 1854 provided for a divestment, abrogation, or destruction of the *"permanent homes"* vested allotment/patent status as understood by the treaty signers in connection with consistent applicable treaty language would be invalid as arbitrary in violation of the Fifth Amendment guarantee of due process law.

5. The Court of Appeals decision in this case is manifestly unfair and insupportable as not being based on the legally operative facts of record in this case. *"Judicis est judicare secundum allegata et probata"* (Dyer 12). The undisputed record before the Court of Appeals showed that the original *permanent homes* land allotment to one Jimmy Cross, head of family was duly made by "Certificate of Assignment" in 1881. (Appendix D, p. A-35). This misstatement of fact of record (Appendix B, p. A-18) makes a material difference because in so doing the Court of Appeals can and does ignore the most nearly important piece of evidence in the whole record of what both the U.S. government and the Puyallup Indians in 1881 clearly understood the nature or character of the *permanent homes* allotment per Art. 6 Medicine Creek Treaty to be. I.e. a use and occupancy interest only; obviously not a *fee* interest of any type. See *Eells v. Ross*, supra.

Contrary to the record the Court of Appeals has found that the originally allotted and patented *permanent homes* land of one Jimmy Cross was "formerly located on the Puyallup Indian Reservation." In fact of record (Appendix D p. A-33) and law *(U.S.A. v. State of Washington*, 496 F.2d 630 (9th Cir. 1974)), the land

in dispute is within the boundaries of the Puyallup Indian reservation and always has been. See also *Eells v. Ross*, supra, wherein the court held that the allotments of *"permanent homes"* in severalty did n t revoke the reservation. This holding alone confirms that Art. 6 Medicine Creek Treaty *"permanent homes"* allotments/patents are not, and could not be in the nature or character of any type of *fee* estate.

The Court of Appeals decision merely assumes without reason or even explanation of any kind that the term "aliened" as used in Art. 6. Treaty with the Omahas amounts to the meaning of the word "alienate" which has a much more specific meaning, i.e. to convey or transfer in fee. This assumption is merely that, and hardly evidence of law which itself must represent the highest reasoning of a man in order to truly be law. The record of facts before the Court of Appeals (R. Tr. 42), (Appendix D, p. A-35, 36, 37) clearly provide evidence of the proper distinctions to be made in the use of the above terms as a matter of law.

The Court of Appeals created a moot, "straw man" type issue where in its opinion, it finds that Petitioners were requesting an interpretation of Art. 6 Medicine Creek Treaty which would render Art. 6 Treaty with the Omahas "internally contradictory." (Appendix B, p. A-22). However this is clearly not the case at all since the facts of record show that Art. 6 Medicine Creek Treaty incorporates provisions of Art. 6 Treaty with the Omahas only "so far as the same may be applicable." This latter qualification surely prevents a situation of internal contradiction, and should compel a U.S. Court of Law to determine just what is applicable to sustain *"permanent homes,"* as understood by the Indian treaty signers.

The Court of Appeals by its decision (Appendix B, p. A-24) grossly misstates Petitioners position of record regarding the effect to be given the holding in *Choate v. Trapp*, supra, (See Appendix I, p. A-74). Clearly the Court of Appeals misconstrues Petitioners' reliance upon *Choate v. Trapp* giving rise to a wholly unnecessary and unwarranted conclusion. It is clear the Peti-

tioners rely on the principle of *Choate v. Trapp* supra, that rights vested can not be abrogated. It is grossly unfair of the Court of Appeals by its decision to compare the advancing of an original statutory time of a provided for restriction on alienation during the trust period in *Choate*, wherein it is also clear that an express patent in fee is provided for thereafter, to the situation herein. This is clearly so because Art. 6 Medicine Creek treaty contemplates no issuance of a patent in fee to allotted *permanent homes* land under any circumstance.

The Court of Appeals has chosen to completely ignore the main fact of record (Appendices D and E, pp. A-41 and A-55 respectively) that the Indian treaty signers, and coincidentally the U.S. government as well, understood in 1854 at treaty time that *permanent homes* allotments were to be for families in being and their direct tribal descendants — "As long as the sun shines and rivers flow."

CONCLUSION

Art. 6 Medicine Creek Treaty should be interpreted to conform to the understanding of the Indian treaty signers that *permanent homes* allotments and related patents would be for use and occupancy only in order to insure continuity of tribal and tribal members control over their respective reserved *permanent homes* land forever. The Court of Appeals completely avoided this issue. By the Puyallup Land Commission Act of 1893 (27 Stat. 633), (Appendix A, pp. A-12 & 13) as shown by fair interpretation, and especially by required reference to its legislative history (see p. 19), supra, only allotted land *not* needed for homes was possibly authorized for disposal by sale or alienation and then only by conveyance of the Land Commission with approval of the Secretary of Interior. The conveyance by George Cross II himself not even in occupancy of the land at the time of conveyance, is simply not federally authorized in this particular. Thus making the conveyance void on this ground alone. *Oneida v. Oneida*, supra.

Should the 1893 Act (27 Stat. 633) be deemed applicable to allotted land needed for homes, as opposed to allotted land "not needed for homes," the issue of whether abrogation of a treaty time vested right, to use and occupancy of familial patented land running to tribal descendants in being, is constitutional or not is raised. The principle of *Choate v. Trapp*, supra, as it pertains to vested rights would apply to make void any Act in abrogation thereof. An advance of the trust period in *Choate v. Trapp* resulting in an issuance of an expressly provided for patent in fee simple is not an abrogation of a vested right to a fixed trust period. Obviously no such right exists. However there is a treaty time created vested right to a *permanent homes* allotment in use and occupancy as understood, in fact by all concerned, for the enjoyment of successive generations of Puyallup Indians on the basis provided for and guaranteed.

Additionally the Court of Appeals decision should not be allowed to stand as it rests entirely upon insupportable premises of fact contradictory to the undisputed record of facts in the case.

STATEMENT OF COMPLIANCE WITH S.CT. RULE 29 4(b):

Petitioners have raised in the two Federal Courts below the question of the constitutionality of the Puyallup Land Commission Act of 1893 (27 Stat. 633), but only where it is determined that Congress possessed the legislative intention to empower alienation (transfer in fee) of permanent homes allotted land *as needed for homes. Accordingly 28 U.S.C.* § 2403(a) may be applicable. Since the United States in *no* way has been a party to this case a true copy of Petition for Writ of Certiorari is to be served upon the U.S. Solicitor General, Department of Justice.

DOUGLAS SULKOSKY
Counsel for Petitioner

APPENDIX A
TREATY PROVISIONS AND STATUTES INVOLVED

TREATY PROVISIONS

Medicine Creek Treaty of 1854 (10 Stat. 1132)

FRANKLIN PIERCE
PRESIDENT OF THE UNITED STATES OF AMERICA
To all and singular to whom these presents shall come, greeting:

Whereas a treaty was made and concluded on the She-nah-nam, or Medicine creek, in the Territory of Washington, on the twenty-sixth day of December, one thousand eight hundred and fifty-four, between the United States of America and the Nisqually and other bands of Indians, which treaty is in the words following, to wit:

Articles of agreement and convention made and concluded on the She-nah-nam, or Medicine creek, in the Territory of Washington, this twenty-sixth day of December, in the year one thousand eight hundred and fifty-four, by Issac I. Stevens, governor and superindendent of Indian affairs of the said Territory, on the part of the United States, and the undersigned chiefs, headmen, and delegates of the Nisqually, Puyallup, Steilacoom, Squawksin, S'Homamish, Steh-chass, T'Peeksin, Squi-aitl, and Sa-heh-wamish tribes and bands of Indians, occupying the lands lying round the head of Puget's sound and the adjacent inlets, who, for the purpose of this treaty, are to be regarded as one nation, on behalf of said tribes and bands, and duly authorized by them.

ARTICLE I.

The said tribes and bands in Indians hereby cede, relinquish, and convey to the United States all their right, title. and interest

in and to the lands and country occupied by them, bounded and described as follows, to wit: Commencing at the point on the eastern side of Admirality inlet, known at Point Pully, about midway between Commencement and Elliott bays; thence running in a southeasterly direction, following the divide between the waters of the Puyallup and Dwamish or White rivers, to the summit of the Cascade mountains; thence southerly, along the summit of said range, to a point opposite the main source of the Skookum Chuck creek; thence to and down said creek, to the coal mine; thence northwesterly, to the summit of the Black Hills, thence northerly, to the upper forks of the Satsop river, thence northeasterly, through the portage known a Wilke's Portage, to Point Southworth, on the western side of Admirality inlet; thence around the foot of Vashon's island, easterly and southeasterly, to the place on beginning.

ARTICLE II.

There is, however, reserved for the present use and occupation of the said tribes and bands the following tracts of land, viz: The small island called Klah-che-min, situated opposite the mouths of Hammersley's and Totten's inlets, and separated from Hartstene island by Peal's passage, containing about two sections of land by estimation; a square tract containing two sections, or twelve hundred and eighty acres, on Puget's Sound, near the mouth of the She-nah-nam creek, one mile west of the meridian line of the United States land survey, and a square tract containing two sections, or twelve hundred and eighty acres, lying on the south side of Commencement bay; all which tracts shall be set apart and, so far as necessary, surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the tribe and the superintendent or agent. And the said tribes and bands agree to remove to and settle upon the same within one year after the ratification of this treaty, or sooner if the means are furnished them. In the meantime, it shall be lawful for them to reside upon any

ground not in the actual claim and occupation of citizens of the United States, and upon any ground claim and occupation of citizens of the United States, and upon any ground claimed or occupied, if with the permission of the owner or claimant. If necessary for the public convenience roads may be run through their reserves, and, on the other hand, the right of way with free access from the same to the nearest public highway is secured to them.

ARTICLE III

The right of taking fish at all usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands; *Provided, however,* That they shall not take shell fish from any beds staked or cultivated by citizens, and that they shall alter all stallions not intended for breeding horses, and shall keep up and confine the latter.

ARTICLE IV

In consideration of the above cession, the United States agree to pay to the said tribes and bands the sum of thirty-two thousand five hundred dollars, in the following manner, that is to say: For the first year after the ratification hereof three thousand two hundred and fifty dollars; for the next two years three thousand dollars each year; for the next three years two thousand dollars each year; for the next four years fifteen hundred dollars each year; for the next five years twelve hundred dollars each year, and for the next five years one thousand dollars each year; all which said sums of money shall be applied to the use and benefit of the said Indians under the direction of the President of the United States, who may from time to time determine at his discretion upon what beneficial objects to expend the same. And the superintendent of Indian affairs, or other proper officer, shall each year

inform the President of the wishes of said Indians in respect thereto.

ARTICLE V

To enable the said Indians to remove to and settle upon their aforesaid reservations, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the sum of three thousand two hundred and fifty dollars, to be laid out and expended under the direction of the President, and in such manner as he shall approve.

ARTICLE VI

The President may hereafter, when in his opinion the interests of the Territory may require, and the welfare of the said Indians be promoted, remove them from either or all of said reservatios to such other suitable place or places within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of their removal, or may consolidate them with other friendly tribes or bands. And he may further, at his discretion, cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indian, and which he shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President, and payment be made accordingly therefor.

ARTICLE VII.

The annuities of the aforesaid tribes and bands shall not be taken to pay the debts of the individuals.

ARTICLE VIII.

The aforesaid tribes and bands acknowledge their dependence on the government of the United States and promise to be friendly with all citizens thereof, and pledge themselves to commit no depredations on the property of such citizens. And should any one of or more of them violate this pledge, and the fact be satisfactorily proved before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the government out of their annuities. Nor will they make war on any other tribe except in self-defence, but will submit all matters of difference between them and other Indians to the government of the United States, or its agent, for decision, and abide thereby. And if any of the said Indians commit and depradations on any other Indians within the Territory, the same rule shall prevail as that prescribed in this article in cases of depredations against citizens. And the said tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

ARTICLE IX.

The above tribes and bands are desirous to exclude from their reservations the use of ardent spirits, and to prevent their people from drinking the same, and therefore, it is provided, that any Indian belonging to said tribes who is guilty of bringing liquor into said reservations, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her for such time as the President may determine.

ARTICLE X.

The United States further agree to establish at the general agency or the district of Puget's Sound, within one year from the ratification hereof and to support for a period of twenty years, an agricultural and industrial school, to be free to children of the said tribes and bands, in common with those of the other tribes

of the said district, and to provide the said school with a suitable instructor or instructors, and also to provide a smithy and carpenter's shop, and furnish them with the necessary tools, and employe a blacksmith, carpenter, and farmer, for the term of twenty years, to instruct the Indians in their respective occupations. And the United States further agree to employ a physician to reside at the said central agency, who shall furnish medicine and advice to their sick, and shall vaccinate them; the expenses of the said school, shops, employees, and medical attendance, to be defrayed by the United States, and not deducted from the annuities.

ARTICLE XI.

The said tribes and bands agree to free all slaves now held by them, and not to purchase or acquire others hereafter.

ARTICLE XII.

The said tribes and bands finally agree not to trade at Vancouver's island, or elsewhere out of the dominions of the United States; nor shall foreign Indians be permitted to reside in their reservations without consent of the superintendent or agent.

ARTICLE XIII.

This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President of the United States.

In testimony whereof the said Issac I. Stevens, governor and superindendent of Indian affairs, and the undersigned chiefs, headmen, and delegates of the aforesaid tribes and bands, have hereunto set, their hands and seals at the place and on the day and year hereinbefore written.

ISSAC I. STEVENS, [L.S.]
Governor and Superintendent Territory of Washington
QUI-EE-METL, his x mark, [L.S.]
SNO-HO-DUMSET, his x mark, [L.S.]

LESH-HIGH,	his x mark, [L.S.]
SLIP-O-ELM,	his x mark, [L.S.]
KWI-ATS,	his x mark, [L.S.]
STEE-HIGH,	his x mark, [L.S.]
DI-A-KEH,	his x mark, [L.S.]
HI-TEN,	his x mark, [L.S.]
SQUA-TA-HUN,	his x mark, [L.S.]
KAHK-TSE-MIN,	his x mark, [L.S.]
SONAN-O-YUTL,	his x mark, [L.S.]
KL-TEHP,	his x mark, [L.S.]
SAHL-KO-MIN	his x mark, [L.S.]
T'BET-STE-HEH-BIT,	his x mark, [L.S.]
TCHA-HOOS-TAN,	his x mark, [L.S.]
KE-CHA-HAT,	his x mark, [L.S.]
SPEE-PEH,	his x mark, [L.S.]
SWE-YAH-TUM,	his x mark, [L.S.]
CHA-ACHSH,	his x mark, [L.S.]
PICH-KEHD,	his x mark, [L.S.]
S'KLAH-O-SUM,	his x mark, [L.S.]
SAH-LE-TATL,	his x mark, [L.S.]
SEE-LUP,	his x mark, [L.S.]
HI-NUK,	his x mark, [L.S.]
MA-NO-NISH,	his x mark, [L.S.]
CHEELS,	his x mark, [L.S.]
KNUTCANU,	his x mark, [L.S.]
BATS-TA-KOBE,	his x mark, [L.S.]
WIN-NE-YA,	his x mark, [L.S.]
KLO-OUT,	his x mark, [L.S.]
SE-UCH-KA-NAM,	his x mark, [L.S.]
SKE-MAH-HAN,	his x mark, [L.S.]
WUTS-UN-A-PUM,	his x mark, [L.S.]
QUUTS-A-TADM,	his x mark, [L.S.]
QUUT-A-HEH-MTSN,	his x mark, [L.S.]
YAH-LEH-CHN,	his x mark, [L.S.]
TO-LAHL-KUT,	his x mark, [L.S.]

YUL-LOUT,	his x mark, [L.S.]
SEE-AHTS-OOT-SOOT,	his x mark, [L.S.]
YE-TAHKO,	his x mark, [L.S.]
WE-PO-IT-EE,	his x mark, [L.S.]
KAH-SLD,	his x mark, [L.S.]
LA'H-HOM-KAN,	his x mark, [L.S.]
PAH-HOW-AT-ISH,	his x mark, [L.S.]
SWE-YEHM,	his x mark, [L.S.]
SAH-HWILL,	his x mark, [L.S.]
SE-KWAHT,	his x mark, [L.S.]
KAH-HUM-KLT,	his x mark, [L.S.]
YAH-KWO-BAH,	his x mark, [L.S.]
WUT-SAH-LE-WUN,	his x mark, [L.S.]
SAH-BAT-HAT,	his x mark, [L.S.]
TEL-E-KISH,	his x mark, [L.S.]
SWE-KEH-NAM,	his x mark, [L.S.]
SIT-OO-AH,	his x mark, [L.S.]
KO-QUEL-A-CUT,	his x mark, [L.S.]
JACK,	his x mark, [L.S.]
KEH-KISE-BE-LO,	his x mark, [L.S.]
GO-YEH-HN,	his x mark, [L.S.]
SAH-PUTSH,	his x mark, [L.S.]
WILLIAM,	his x mark, [L.S.]

Executed in the presence of us —

M.T. SIMMONS,
Indian Agent.
JAMES DOTY,
Secretary of the Commission.
C.H. MASON,
Secretary Washington Territory
W.A. SLAUGHTER,
1st Lieut. 4th Infantry,
JAMES McALISTER,
E. GIDDINGS, jr.,

GEORGE SHAZER,
HENRY D. COCK,
S.S. FORD, jr.,
JOHN W. McALISTER,
CLOVINGTON CUSHMAN,
PETER ANDERSON,
SAMUEL KLADY,
W.H. PULLEN,
P.O. HOUGH,
E.R. TYERALL,
GEORGE GIBBS,
BENJ. F. SHAW, *Interpreter,*
HAZARD STEVENS

And whereas the said treaty having been submitted to the Senate of the United States, for its constitutional action thereon, the Senate did, on the third day of March, one thousand eight hundred and fifty-five, advise and consent to the ratification of its articles by a resolution in the words and figures, following, to wit:

"IN EXECUTIVE SESSION,
SENATE OF THE UNITED STATES,"
March 3, 1855.

"*Resolved,* (two-thirds of the senators present concurring,) That the Senate advise and consent to the ratification of the articles of agreement and convention made and concluded on the She-nah-nam, or Medicine creek, in the Territory of Washington, this twenty-sixth day of December, in the year one thousand eight hundred and fifty-four, by Isaac I. Stevens, governor and superintendant of Indian affairs of the said Territory, on the part of the United States, and the undersigned chiefs, headmen, and delegates of the Nisqually, Puyallup, Steilacoom, Squaksin, S'Homamish, Steth-chass, T'Peeksin, Squi-aitl, and Sa-heh-wamish tribes and bands of Indians occupying the lands lying round the head of

Puget's Sound and the adjacent inlets, who, for the purpose of this treaty, are to be regarded as one nation, on behalf of said tribes and bands, and duly authorized by them.

"Attest: ASBURY DICKINS,
"Secretary."

Now, therefore, be it known that I, FRANKLIN PIERCE, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in their resolution of the third day of March, one thousand eight hundred and fifty-five, accept, ratify, and confirm the said treaty.

In testimony whereof, I have caused the seal of the United States to be hereto affixed, having signed the same with my hand.

Done at the city of Washington, this tenth day of April, in the year of our Lord one thousand eight hundred and fifty-five, and of the independence of the United States the seventy-ninth.

FRANKLIN PIERCE

By the President:
W.L. MARCY, *Secretary of State.*

Treaty with the Omahas of 1854 (10 Stat. 1043).

ARTICLE 6

The President may, from time to time, at his discretion, cause the whole or such portion of the land hereby reserved, as he may think proper, or of such other land as may be selected in lieu threof, as provided for in article first, to be surveyed into lots, and to assign to such Indian or Indians of said tribe as are willing to avail of the privilege, and who will locate on the same as a permanent home, if a single person over twenty-one years of age, one-eighth of a section; to each family of two, one quarter section; to each family of three and not exceeding five, one half section; to each family of six and not exceeding ten, one section;

and to each family over ten in number, one quarter section for every additional five members. And he may prescribe such rules and regulations as will insure to the family, in case of the death of the head thereof, the possession and enjoyment of such permanent home and the improvements thereon. And the President may, at any time, in his discretion, after such person or family has made a location on the land assigned for a permanent home, issue a patent to such person or family for such assigned land, conditioned that the tract shall not be aliened or leased for a longer term than two years; and shall be exempt from levy, sale or forteiture, which conditions shall continue in force, until a State constitution, embracing such lands within its boundaries shall have been formed, and the legislature of the State shall remove the restrictions. And if any such person or family shall at any time neglect or refuse to occupy and till a portion of the lands assigned and on which they have located, or shall rove from place to place, the President may, if the patent from such person or family have been issued, cancel the assignment, and may also withhold from such person or family, their proportion of the annuities or other moneys due them, until they shall have returned to such pernament home, and resumed the pursuits of industry; and in default of their return the tract may be declared abandoned, and thereafter assigned to some other person or family of such tribe, or disposed of as is provided for the disposition of the excess of said land. And the residue of the land hereby reserved, or of that which may be selected in lieu thereof, after all of the indian persons or families shall have had assigned to them permanent homes, may be sold for their benefit, under such laws, rules or regulations, as may hereafter be prescribed by the Congress or President of the United States. No State legislature shall remove the restrictions herein provided for, without the consent of Congress.

FEDERAL STATUTES INVOLVED

23 Stat. 76, 88-89. Appropriation Act of July 4, 1884.

"Three thousand dollars or so much thereof as may be necessary to enable the President to cause to be surveyed such portion of the Puyallup reservation in Washington Territory into lots as he may deem advisable and direct, and the same assigned to such individual Indians or families of such reservation as are willing to avail themselves of the privilege and will locate on the same as permanent homes in accordance *with the terms of Article VI of the Treaty* made on December Twenty-sixth, Eighteen Hundred and Fifty-four, and ratified by the Senate March Third Eighteen Hundred and Fifty five." [Medicine Creek Treaty] (Emphasis added).

27 Stat. 633 Puyallup Indian Commission Act of March 3, 1893.

That the President of the United States is hereby authorized immediately after the passage of this act to appoint a commission of three persons, and not more than one of whom shall be a resident of any one State, and it shall be the duty of said commission to select and appraise such portions of the allotted lands as are not required for homes for the Indian allotees; and also that part of the agency tract, exclusive of the burying ground, not needed for school purposes, in the Puyallup Reservation, in the State of Washington, And if the Secretary of the Interior shall approve the selections and appraisments made by said commission, the allotted lands so selected shall be sold for the benefit of the allottees, and the agency tract for the benefit of all the Indians, after due notice at public auction at not less than the appraised value for cash, or one-third cash, and the remainder on such time as the Secretary of the Interior may determine, to be secured by vendor's lien on the property sold.

It shall be the duty of said commission, or a majority of them, to superintend the sale of said lands, ascertain who are the true owners of the allotted lands, have guardians duly appointed for the minor heirs of any deceased allottees, make deeds of the lands to the purchasers thereof, subject to the approval of the Secretary of the Interior, which deeds shall operate as a complete conveyance of the land upon the full payment of the purchase money; and the whole amount received for allotted lands shall be placed in the Treasurury to the credit of the Indian entitled thereto and the same shall be paid to him in such sums and at such times as the Commissioner of Indian affairs, with the approval of the Secretary of the Interior, shall direct: *Provided*, That the portion of the agency tract selected for sale shall be platted into streets and lots as an addition to the City of Tacoma, and sold in separate lots, in the same manner as the allotted lands, and the amount of received therefor, less the amount necessary to pay the expenses of said commission, including salaries shall be placed to the credit of the Puyallup band of Indians as a permanent school fund to be expended for their benefit: *And provided further*, That the Indian allottees shall not have power of alienation of the allotted lands not selected for sale by said Commission for a period of ten years from the date of the passage of this act and no part of the allotted land shall be offered for sale until the Indian or Indians entitled to the same shall have signed a written agreement consenting to the sale thereof, and appointing said commissioners, or a majority of them, trustees to sell said land and make a deed to the purchaser thereof; and no part of the agency tract shall be sold until a majority of said Indians shall consent thereto in a written agreement, which shall also constitute said commissioners, or a mofiroty of them, trustees to sell said land, as directed in this act, and make deeds to the purchaser for the same. The deeds executed by said commission shall not be valid until approved by the Secretary of the Interior, who is hereby directed to make all necessary regulations to carry out the purposes of the foregoing provisons. The proceeds arising from the sale of

the allotted lands shall be placed in the Treasury to the credit of the respective allottees, and the net proceeds of the agency tract, after paying the expenses of said commission in the appraisment and sale of said lands, and reimbursing the United States for the amount advanced to said commission, shall be placed in the Treasury of the United States to the credit of all said Indians, and the said sums shall draw interest at a rate of four per centum per annum, and the income shall be annually expended for the benefit of said Indians, under the directon of the Secretary of the Interior: *Provided;* That an amount not exceeding one tenth of the principal sum may be expended for their benefit during any fiscal year, if deemed necessary by the Secretary of the Interior: *Provided further,* That the entire expense herein incurred shall be apportioned by the Secretary of the Interior pro rata between the several allottees and the owners of the tribal tract; and the Secretary of the Interior may in his discretion designate one member of said Commission to superintend the execution of any of the requirements of said Commission herein provided for.

And the sum of twenty thousand dollars or so much hereof as may be necessary, is hereby appropriated for the purpose of defraying the expenses of said commission, to be reimbursed to the United States out of the proceeds of the sale of that portion of the agency tract, to be immediately available.

33 Stat. 565. Act Confirming Removal of Restrictions Upon Alienation of Puyallup Indian Allotted Land of April 28, 1904.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act of Congress approved March third, eighteen hundred and ninety-three (Twenty-seventh Statues, page six hundred and thirty-three), authorizing the sale of the Puyallup allotted lands, with restriction upon alienation "for a period of ten years from the date of the passage" thereof, shall be taken and construed as having expressed the consent of the United States to the removal of res-

triction upon alienation by said Puyallup Indians to their allotted lands from and after the expiration of said period shall be given effect of having been made without any restrictions upon the power of the allottee to alienate his land.

Approved April 28, 1904.

STATE STATUTE INVOLVED

1890 Wash. Laws, 499

The said Indians who now hold, or who may hereafter hold, any of the lands of any reservation, in severalty, located in this state by virtue of treaties made between them and the United States, shall have power to lease, incumber, grant and alien the same in like manner and with like effect as any other person may do under the laws of the United States and of this state, and all restrictions in reference thereto are hereby removed.

All deeds, conveyances, encumbrances or transfers of any nature and kind executed by any Indian, or in any manner disposing of any land, or interest therein, shall be by deed executed in the same manner as prescribed for the execution of deeds conveying real estate, or any interest therein, except that the same shall in all cases be acknowledged before a judge of a court of record. In taking said acknowledgment, the said judge shall explain to the grantor the contents of said deed or instrument, and the effect of the signing or execution thereof, and so certify the same in the acknowledgement, and before the same shall be admitted to record shall duly examine and approve the said deed or other instrument.

This act shall take effect and be in force from and after the consent to such removal of the restrictions shall have been given by the congress of the United States.

APPENDIX B
OPINION/DECISION OF U.S. COURT OF APPEALS
(9TH CIR.)

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SILAS V. CROSS; VERNON CROSS,
Plaintiffs-Appellants,
v.
STATE OF WASHINGTON: BOOTH GARDNER, Hon. BRIAN BOYLE, Commissioner, Commissioner Public Lands; PIERCE COUNTY; SHELDON COOK; PATRICK KENNEY; JOSEPH STORTINI,
Defendants-Appellees.

No. 89-35890
D.C. No. CV-88-410-AJB
OPINION

Appeal from the United States District Court
for the Western District of Washington
Robert J. Bryan, District Judge, President

Argued and Submitted
June 5, 1990 — Seattle, Washington

Filed August 15, 1990

Before: Eugene A. Wright and J. Clifford Wallace, Circuit Judges, and Robert E. Jones,[1] District Judge.

Opinion by Judge Wallace

[1]Honorable Robert E. Jones, United States District Judge, District of Oregon, sitting by designation.

Cross v. State of Washington

SUMMARY

Native Americans

Affirming the district court's grant of summary judgment, the court of appeals held that the 1941 conveyance to the State of Washington of property originally allotted to Puyallup Indians under the Medicine Creek Treaty in 1886 was valid.

This case concerned a dispute over the land formerly located on the Puyallup Indian Reservation in Washington, In 1886, pursuant to Article 6 of the Medicine Creek Treaty, the United States allotted Jimmy Cross, the ancestor of appellants Silas and Vernon Cross, a patent for land on the Puyallup Reservation. This property was included in the estate of Jimmy Cross, and upon his death in 1930, was distributed to his surviving sons, Silas and George Cross. In 1938, George Cross and his wife conveyed two parcels of land to Andre, who in 1941, conveyed these parcels to the State of Washington. Since then, the land has been used as an agricultural research facility by Washington State University. In 1988, the Crosses filed suit challenging the validity of these last two transactions and seeking to eject the State of Washington and Washington State University from the lands. The Crosses appeal the district court's grant of summary judgment in favor of the State of Washington.

[1] The Crosses contended that since the patent issued to Jimmy Cross in 1886 was a "permanent home" patent, it could not be alienated to non-family members and that consequently, George Cross's conveyance of the property to Andre was void. [2] The plain language of the Medicine Creek Treaty and the Omaha Treaty to which the Medicine Creek Treaty refers, provides that alienation of the land parcels for permanent homes under the treaty may be removed if the Washington State legislature removes the restrictions and if Congress consents to the removal.

[3] In 1890, the Washington legislature enacted a statute removing all restrictions upon the sale of allotted land by Puyallup Indians. [4] In 1904, Congress acknowledged the expiration of the ten-year restriction on alienation it had placed on the Indians' allotted land in 1893, and removed all restrictions upon alienation by the Puyallup Indians. This unambiguous expression of congressional consent to the earlier Washington law removing restrictions on alienation satisfied the second condition imposed by the Medicine Creek and Omaha Treaties. Therefore, George Cross was free to alienate his parcels of land to Andre, who, in turn, was free to alienate them to the State of Washington.

COUNSEL

Douglas D. Sulkosky, Law Offices of John R. Kramer, Tacoma, Washington, for the plaintiffs-appellants.

John W. Hough, Senior Assistant Attorney General, Olympia, Washington, for the defendants-appellees.

OPINION

WALLACE, Circuit Judge:

The Crosses appeal from the summary judgment entered by the district court in favor of the State of Washington and various governmental entities and employees. The district court possessed jurisdiction pursuant to 25 U.S.C. § 345. We have jurisdiction over this timely appeal pursuant to 28 U.S.C. § 1291. We affirm.

I

This case concerns a dispute over land formerly located on the Puyallup Indian Reservation in Washington. The Puyallup Indian Reservation was created by the Treaty with Nisquallys, & c., 10 Stat. 1132 (1854) (Medicine Creek Treaty). Article 6 of the Medicine Creek Treaty provides for the allotment of lands to the individual Indians. In 1886, pursuant to Article 6 of the Medicine Creek Treaty, the United States allotted the Crosses' ances-

tor, Jimmy Cross, a patent for land on the Puyallup Reservation. This property was included in the estate of Jimmy Cross and, upon his death in 1930, was distributed to his surviving sons, Silas and George Cross. In 1938, George Cross and his wife conveyed two parcels of the land to Andre. In 1941, Andre conveyed these parcels to the State of Washington. Since 1941, the land has been used as an agricultural research facility by Washington State University.

In 1988, the Crosses filed suit in the district court challenging the validity of these last two transactions and seeking to eject the State of Washington and Washington State University from the lands. The district court entered summary judgment against the Crosses.

II

We review the summary judgment de novo. *Kruso v. International Telephone & Telegraph Corp.*, 872 F.2d 1416, 1421 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 3217 (1990). We must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Tzung v. State Farm Fire and Casualty Co.*, 873 F.2d 1338, 1339-40 (9th Cir. 1989).

[1] The first issue we address is whether the district court erred as a matter of law in concluding that the conveyance from George Cross to Andre was valid. The Crosses content that since the patent issued to Jimmy Cross in 1886 was a "permanent home" patent, it could not be alienated to non-family members, and that consequently George Cross's conveyance of the property to Andre was void. To evaluate the merits of this contention, we must examine the statutory and treaty background of the allotment scheme on the Puyallup Indian Reservation.

[2] The original allotment of land to members of the Puyallup Tribe occured pursuant to Article 6 the Medicine Creek Treaty. Article 6 states that the President

> may....at his discretion, cause the whole or any portion of the

> lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to each individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a *permanent home*, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable.

10 Stat. at 1133 (emphasis added). Article 6 of the Treaty with the Omahas, 10 Stat. 1043 (1854) (Omaha Treaty), to which the Medicine Creek Treaty refers, states that

> the President may, at any time, in his discretion, after such person or family has made a location on the land assigned for a *permanent home*, issue a patent to such person or family for such assigned land, conditioned that the tract shall not be aliened or leased for a longer term than two years; and shall be exempt from levy, sale, or forfeiture, *which conditons shall continue in force, until a State constitution, embracing such lands within its boundaries, shall have been formed, and the legislature of the State shall remove the restrictions....No State legislature shall remove the restrictions herein provided for, without the consent of Congress.*

Id. at 1044-45 (emphasis added). The plain language of these two treaties states that Puyallup Indians may be allotted land for "permanent homes" subject to the restrictions on alienation and leasing of the land contained in Article 6 of the Omaha Treaty. Article 6 of the Omaha Treaty, however, expressly provides that states may remove those restrictions if Congress consents. Therefore, the alienation of the land parcels by George Cross was valid under the relevant treaties if (1) the Washington legislature removed the restrictions and (2) Congress consented to the removal of those restrictions.

[3] In 1890, the Washington legislature enacted a statute, pursuant to Article 6 of the Medicine Creek Treaty, removing all res-

trictions upon the sale of allotted land by Puyallup Indians. 1890 Wash. Laws 499, *see also* Wash. Rev. Code § 64.20.010 (1966). The 1890 statute provided that the Indians "shall have power to lease, incumber, grant and alien the [land] in like manner and in like effect as any other person may do under the laws of the United States and of [Washington], and all restrictions in reference thereto are hereby removed." 1890 Wash. Laws at 500. The statute further provided, in accord with Article 6 of the Omaha Treaty, that the statute "shall take effect and be in force from and after the consent to such removal of the restrictions shall have been given by the congress of the United States." *Id.* at 501. This statute clearly satisfies the first requirement for the removal of restrictions on alienation under the Omaha Treaty: the removal of those restrictions by an act of the state legislature. We therefore turn to whether the second requirement mentioned in the Omaha Treaty — congressional consent — was also satisfied.

In 1893, Congress decided to remove, over time, the restrictions on alienation imposed upon the Puyallups by the Medicine Creek Treaty and the Omaha Treaty. By an Act of 1893, ch. 209, 27 Stat. 612 (1893), Congress established a commission to sell selected lands on the Puyallup reservation and provided that "Indian allottees shall not have power of alienation of the allotted lands not selected for sale by said Commission for a period of ten years from the date of the passage of this act." *Id.* at 633. Neither party contends that the land was selected for sale by the commission. The land was therefore subject to a ten-year restriction on alienation beginning in 1893.

[4] In 1904, Congress acknowledged the expiration of this ten-year restriction on alienation in An Act Confirming the removal of restrictions upon alienation by the Puyallup Indians of the State of Washington of their allotted lands, ch. 1816, 33 Stat. 565 (1904). That Act stated that

> the Act of Congress approved March third, eighteen hundred and ninety-three..., authorizing the sale of the Puyallup allotted lands, with restriction upon alienation "for a period

> of ten years from the date of the passage" thereof, *shall be taken and construed as having expressed the consent of the United States to the removal of restriction upon alienation by said Puyallup Indians to their allotted lands* from and after the expiration of said period shall be given effect of having been made *without any restrictions upon the power of the allottee to alienate his land.*

Id. at 565 (emphasis added). As this statute clearly indicates, Congress expressly consented to the removal of all alienation restrictions imposed upon the Puyallups by the Medicine Creek Treaty. This unambiguous expression of congressional consent to the earlier Washington law removing restrictions on alienation satisfies the second condition required for the removal of the restrictions imposed by the Medicine Creek and Omaha Treaties. We therefore conclude that, since the restrictions on alienation of the land held by Jimmy Cross were removed in compliance with procedures provided for in the Medicine Creek Treaty and the Omaha Treaty, George Cross was free to alienate his parcels of land to Andre, who, in turn, was free to alienate them to the State of Washington.

The Crosses argue that this reading of the treaties is inconsistent with the notion of a "permanent home," a term mentioned on both the Medicine Creek and Omaha Treaties. They apparently believe that the designation "permanent home" means that the land may *never* be alienated to a non-family member. This construction of the term, however, would render Article 6 of the Omaha Treaty internally contradictory, since that treaty expressly provides that the restrictions on alienation and leasing imposed upon the permanent home allotments may be removed by a state legistlature with congressional consent. We will not adopt a construction of the treaty which would render its language internally condradictory. *See Hughes Air Corp v. Public Utilities Commission*, 644 F.2d 1334, 1338 (9th Cir. 1981) (A "basic rule of statutory construction is that one provision should not be in-

terpreted in a way which is internally contradictory or that renders other provisions of the same statute inconsistent or meaningless.") We therefore reject the interpretation of "permanent home" urged by the Crosses.

In a related argument, the Crosses contend that the patent conveyed to Jimmy Cross by the government entitled him only to use and occupancy of the land, rather than fee title that could be alienated. The Crosses cite no compelling authority in support of this argument. Indeed, the relevant authority on this issue clearly indicates that the United States granted the land in fee simple, not in trust. Shortly after the patent was conveyed to Jimmy Cross, the district court in the Western District of Wasington observed that the patents granted to the Puyallups "conveyed a title in fee simple," subject to certain conditions, such as the restriction on alienation. *United States v. Kopp*, 110 F. 160, 165 (W.D. Wash. 1901). The court then explained that

> [t]he act of 1893 also shows clearly that congress did not then consider the government as being a trustee holding the lands whch had been patented to the Puyallup Indians. That act specifically requires the patentees to execute agreements in writing constituting the commissioners, or a majority of them, trustees to sell the lands and make deeds to the purchasers. This provision is repugnant to any theory of the government being a trustee to hold these lands..., but it is entirely consistent with the elementary pricinple that a valid power to sell and convey the title to property should emanate from the holder of the title, and is in effect an implied legislative determination that the title to the tracts which had been assigned to individual Indians was conveyed to them by the patents. The government continues to have and to exercise the right to restrict alienation of these lands, but it does not hold the title in trust. *Id.* at 165-166. This reasoning is persuasive. Moreover, the Supreme Court has recognized that Puyallup Indians who received land pursuant to the Medi-

cine Creek Treaty held the land in fee simple absolute. In *Puyallup Tribe v. Department of Game*, 433 U.S. 165, 174 (1977), the Supreme Court, referring to the two statutes discussed earlier, observed that "[p]ursuant to two Acts of Congress, 27 Stat. 633 and c. 1816, 33 Stat. 565, the Puyallups alienated, *in fee simple absolute*, all but 22 acres of their 18,000 acre reservation." *See also Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251, 1254 (9th Cir. 1983) (pointing out that "most of the [Puyallup] reservation was allotted to individual Indians and passed into individual Indian and non-Indian ownership"), *cert. denied*, 465 U.S. 1049 (1984). We therefore conclude that the patent issued to Jimmy Cross gave him fee simple title which could be freely alienated.

The Crosses next contend that the removal of the restrictions on alienation by Congress violated their right to due process under the fifth amendment of the Constitution. They rely upon *Choate v. Trapp*, 224 U.S. 665 (1912), in support of this proposition. But *Choate* did not hold that the removal of restraints on alienation constitutes a violation of due process. Rather, *Choate* held only that *tax exempt status* creates a property right which cannot be removed by the state without due process of the law. *Id.* at 673-74. Indeed, the Court in *Choate* expressly distinguished between the right to a tax exemption, which it deemed to be a property right and therefore protected by the fifth amendment, and restriction on alienation, which it did not consider to be a property right and hence not entitled to such protection. *See Id.* at 672-73.

Finally, in their reply brief, the Crosses appear to contend that they possess aboriginal rights in the disputed property. This argument, however, was not specifically and distinctly raised and argued in the Crosses' opening brief and we therefore will not consider it. *International Union of Bricklayers v. Martin Jaska, Inc.*, 752 F.2d 1401, (9th Cir. 1985) ("[W]e will not ordinarily consider matters on appeal that are not specifically and distinctly raised and argued in appellant's opening brief.")

Because we decide that the state possesses valid title to the land,

we do not need to reach the question of whether the Crosses' claims are time barred.

AFFIRMED.

APPENDIX C
DECISION OF U.S. DISTRICT COURT FOR
WESTERN WASHINGTON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

SILAS V. CROSS and VERNON CROSS, *Plaintiffs,* v. PIERCE COUNTY, a Political Sub-Division of the State of Washington; SHELDON COOK, Assessor-Treasurer; PATRICK KENNEY, Director of Budget and Finance; JOSEPH STORTINI, Executive; and STATE OF WASINGTON; HON. BOOTH GARDNER; and BRIAN BOYLE, Commissioner of Public Lands; WASHINGTON STATE UNIVERSITY and its BOARD OF REGENTS and its SECRETARY, *Defendants.*	CASE NO. C88-410TB ORDER 1) DENYING PLAINTIFFS' REQUEST TO FIND RESPONSE BRIEF WITHOUT MERIT; and 3) GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT and DISMISSING CASE

THIS MATTER comes before the court on Defendants' Motion for Summary Judgment and on Plaintiffs' Motion for Summary Judgment. The plaintiffs have also requested the court to find defendants' Response Brief without merit, based on Local Rule CR 7(b) (2). The court has considered all pleadings filed

in support of and in opposition to the motions, and the file. The court's ruling follows:

Under Fed. R. Civ. P. 56(c), the entry of summary judgment is mandated when the evidence in the record shows no genuine issues of material fact. *T.W. Elec. Service v. Pacific Elec. Contractors*, 809 F.2d 626 (9th Cir. 1987); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1985). A motion for summary judgment must be granted against the nonmoving party who fails to prove an essential element of the claim. A genuine dispute over a material fact exists if the evidence is such that a reasonable jury could return a verdict of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). The court must also consider the substantive evidentiary burden that the nonmoving party must meet at trial. *T.W. Elec. Service v. Pacific Alec. Contractors*, *supra* at 632.

FACTUAL BACKGROUND

Plaintiffs, Silas V. Cross and Vernon Cross, seek ejectment of the State of Washington and its Washington State University from lands plaintiffs allege were illegally conveyed by their predecessors. Plaintiffs are members of the Puyallup Indian Tribe, and are bringing this suit in their individual capacity, not on behalf of their Tribe.

The Treaty with Nisqually Indians, also known and referred to by both parties as the Medicine Creek Treaty, provided in article 6 for allotment of reservation land to individual Indians. ("Addendum 1" of defendants' Motion for Summary Judgment.) In 1884, Congress provided for the survey of the Puyallup Reservation for the purpose of assigning lots to individual Indians or families. 23 Stat 76 (1884). In 1886, plaintiffs' predecessor, Jimmy Cross, received a patent from the United States for land allotted to him pursuant to article 6 of the Treaty of Medicine Creek. (Addendum 4 and 5.)

Beginning in 1919, a series of transactions occurred with respect to the Jimmy Cross patented land, including transfer by probate and warranty deeds. (Addendums 9-20.) The patented property

was eventually included in the estate of Jimmy Cross, and upon his death his interest in the property was distributed in 1932, one-half each to surviving sons, Silas and George Cross. (Addendum 18.)

In 1938, George Cross and his wife conveyed two parcels to Ben L. Andre. (Addendum 19.) In 1941, Ben L. Andre conveyed these two parcels to the state of Washington. (Addendums 20A and B.) These last two transactions are the focus of the summary judgment motions.

ISSUES

I. Whether the legal chain of title establishing fee ownership in the state of Washington is clearly established.

II. Whether the plaintiffs are time-barred from asserting their ejectment claim.

A. Whether plaintiffs' claims are barred by statute.

B. Whether plaintiffs' claims are barred by adverse possession.

C. Whether plaintiffs' claims are barred by laches.

DISCUSSION

I. Whether the legal chain of title establishing fee ownership in the state of Washington is clearly established.

The defendants bring to the court's attention that the Treaty of Medicine Creek provided for allotment of reservation land to individual Indians. Also, a patent was issued to Jimmy Cross by the United States in 1886 under the authority of President Grover Cleveland. (Addendum 4.) Furthermore, all restrictions on alienation expired by operation of statute in 1904. 33 Stat. 565 (1904). After that date, the allotted land could be sold in fee simple.

The plaintiffs argue that no legal power ever existed for George Cross to make a valid conveyance to Ben L. Andre, for two reasons: The first is that the character of the allotted trust land was such that it could not be owned in fee simple absolute by any Indian allottee or family successor, because the land was a perma-

nent home trust allotment which could never be sold. Second, since George Cross was not in use and possession because he left the area, he did not, under any theory of treaty interpretation, have the right and power to convey any interest in the land. The law does not support plaintiff's position.

The applicable laws begin with the General Allotment Act, 24 Stat. 388 (1887), which authorized the allotment of Indian land throughout the United States. The Act established a twenty-five year restriction on alienation of allotted lands. (Now codified, as amended, in 25 U.S.C. 331 *et seq.*) In 1893, congress limited such alienation restrictions on patents to Puyallup Indians to ten years from the date of the 1893 Act. 27 Stat 633 (1893). In 1904, Congress acknowledged the expiration of the ten-year restriction period and confirmed that the restrictions on alienation of land allotted to Puyallup Indians well now removed. 33 Stat. 565 (1904).

Also, the Washington State Legislature, pursuant to article 6 of the Medicine Creek Treaty, empowered Indians to alienate allotted lands. (Laws of 1890, pp. 499-501, codified as RCW 64.20.010 *et. seq.*) The Washington Act took effect from and after the removal of all restrictions on alienation by the Congress of the United States.

Article 6 of the Medicine Creek Treaty of 1854 incorporates Article 6 of the Treaty with the Omaha. (Addendums 1 and 2.) Plaintiff argues that language in Article 6 of the Omaha Treaty permitting alienation of allotted land after twenty-five years is inconsistent with the notion of permanent homes, and is therefore inapplicable to Medicine Creek Treaty lands. Article 6 of the Omaha Treaty does provide for allotment of land to tribal members who will locate on the same as a permanent home. The Omaha Treaty then goes on to provide permission for the eventual alienation of the allotted land. (Addendum 2.) The treaty states:

> after such person or family has made a location on the land assigned for a permanent home, issue a patent to such per-

> son or family for such assigned land, conditioned that the tract shall not be aliened or leased for a longer term than two years; and shall be exempt from levy, sale, or forfeiture, which conditions shall continue in force until a State constitution embracing such lands within its boundaries, shall have been formed, and the legislature of the State shall remove the restrictions...No State legislature shall remove the restrictions herein provided for, without the consent of Congress.

(Addendum 2.)

Any restrictions on alienation of plaintiffs' land expired in 1903. 27 Stat. 633 (1893). In 1893, Congress limited restraints on alienation of allotted lands for Puyallup Indians to ten years. the expiration of the ten-year restriction was recognized by Congress. 33 Stat. 565 (1904). The general rule is that when an Indian allottee receives a fee patent to a "trust" allotment, or the federal restriction against alienation is removed from a "restricted fee" allotment, the allottee owns the land in fee simple absolute and can alienate it in any way allowed by local law. *U.S. v. Waller*, 243 U.S. 452, 460 (1917). Here, all restrictions on the alienation of the land in question expired in 1903. The local law, R.C.W. 64.20.010, empowered Indians to alienate allotted lands. The law took effect after the removal of all restrictions on alienation by the United States Congress.

The plaintiffs argue that the statute which reduced the restriction period of alienation from twenty-five years to ten years is unconstitutional. They argue that *Choate v. Trapp*, 224 U.S. 665 (1912) supports their argument. In *Choate*, the court held that removal of the restrictions on alienation was a valid exercise of congressional power, but the attempt to shorten the nontaxable period was unconstitutional. The court also stated that the limitation does not affect the right of allottees to alienate their lands. Here the plaintiffs are not arguing that the nontaxable period was shortened. Therefore, their reliance in *Choate* is misplaced. The holding in *Choate* only affirms the defendants' argument that the

plaintiffs' predecessor had the right to sell the land.

It is clear that in 1903 all restraints on alienation of the land expired. Plaintiffs have not convinced the court that the restrictions have not expired, nor have they convinced the court that their predecessor's land could not have legally been sold in fee simple. The law and federal cases have clearly shown that plaintiff's predecessor had the power to sell the land in fee simple.

The defendants' Motion for Summary Judgment should be granted and the plaintiffs' Motion for Summary Judgment should be denied. Since the defendants' Motion for Summary Judgment will be granted, there is no reason to consider the remaining issues raised by the defendants.

Plaintiffs' request that the court find defendants' Response Brief to be without merit is governed by Local Rule 7(b)(2). The court has discretion to refuse to consider the brief. The defendants' brief was served and filed one day late. The plaintiffs have not alleged that they have been prejudiced by the delay in service and filing. Under these circumstances, the court should consider the brief.

Therefore it is

ORDERED that plaintiffs' Motion for Summary Judgment is DENIED; and it is further

ORDERED that plaintiffs' Request that the court find defendants' Response Brief without merit is DENIED; and it is further

ORDERED that defendants' Motion for Summary Judgment is GRANTED and this case is hereby DISMISSED.

The Clerk of the Court is instructed to send uncertified copies of this Order to all counsel of record.

DATED this 15th day of October, 1989.

/s/ Robert J. Bryan

ROBERT J. BRYAN
United States District Judge

APPENDIX D
AFFIDAVIT OF SILAS V. CROSS IN SUPPORT
OF MOTION FOR SUMMARY JUDGMENT

UNITED STATES DISTRICT COURT
AT TACOMA
WESTERN DISTRICT OF WASHINGTON

Silas V. Cross *Plaintiff* v. [Pierce County] State of Washington; and Brian Boyle, Commissioner of public Land; Washington State University, its Board of Regents and Secretary *Defendants.*	No. C88-410TB AFFIDAVIT OF SILAS V. CROSS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

AFFIDAVIT

STATE OF WASHINGTON
COUNTY OF PIERCE

I, Silas V. Cross, being first duly sworn on oath deposes and says:

I

That he is the Co-Plaintiff in the above titled action and make this sworn Affidavit of fact in support his Motion for Summary Judgment.

II

That affiant was born November 2, 1918 on the land originally allotted to his grandfather, Jimmy Cross in 1881. At the time of

the Medicine Creek Treaty of 1854 (10 Stat. 1132) said Jimmy Cross was a Puyallup tribal member whose tribal name was Pak-aw-wa-tish. He was 2 years old then. Jimmy Cross was also born and raised on the South West corner of his later allotted land. Affiant, along with Co-Plaintiff, Vernon Cross, has lived in tribal relations with the Puyallup tribe all of his life. In the 1950's and 1970's, Affiant served on the Puyallup tribal council covering a period of 17 years.

III

Jimmy Cross and Lucy Cross had four tribally recognized and enrolled children. George I, deceased in 1887, Henry, George II born in 1890 and Silas. The latter is the father of Affiant.

IV

In 1916, Lucy Cross, died and as a result a Probate Court applying State of Washington Community property law of the time confirmed George Cross II as the owners of 30 acres of Jimmy Cross' original "permanent home" allotment subject to the latters' control for his lifetime. Jimmy Cross died in 1932. George Cross II thereafter, who was then living off of the Puyallup Indian reservation and had been for a number of years without resuming residence or locating himself upon said 30 acres of "permanent home" land presumed to sell, convey and transfer the same to one Ben Andre in 1938 who in turn transferred or conveyed the same to the State of Washington's experimental station, in 1941. The State of Washington by its Experimental Station in the Puyallup Valley at Fife, Wash., caused the document of said conveyance to be recorded in the State of Washington' (Pierce County) public real property records as the claimed legal owner thereof.

V

That in 1874, an assignment of permanent home land was made to Jimmy Cross for his, and his present and future family's use

perpetually subject to the condition of perpetual familial maintenance of use and occupancy of the assigned land. This assignment under the terms of the 6th Article Medicine Creek Treaty of 1854 was officially confirmed by a Certificate of Assignment issued to my grandfather Jimmy Cross in 1881 in accordance with the treaty signors understanding of the character of the permanent homes land to be assigned in severalty. Both my grandfather Jimmy Cross and father Silas Cross had told me many times when I was young and even after about receipt of this valuable Certificate of Assignment under which my grandfather was to be assured of the possession and control of his treaty assigned 80 acres for his, and his family descendants use *in perpetuity.* Virtually all other fortunate Puyallup Indian allottees were given Certificates of Assignment for their respective permantent home allotments as well at the same time. It was also understood and relied upon that the United States government would hold the pertinent legal title even though the jurisdiction over the soil, paramount title was a actually vested in the Puyallup tribe as through the circumstances of an earlier United States retrocession in 1856.

VI

When I was growing up from 1918 and upwards, but after 1929, I learned from my mother, Hattie Cross that a true and correct copy of my grandfather's Certificate of Assignment except for the names of assignees was in a law book at the United States Court house in Seattle reporting the case of *George Bird v. Terry.* Bird being a Puyallup tribal Indian and Terry an Indian agent. The citation for this case I later found out was 129 Fed. 472 (1903) and at page 473 in it recited the actual verbatim terms of my grandfather's Certificate of Assignment of permanent home land, these being identical to all other Certificates of Assignment in 1881.

[No. 69]

Department of the Interior
"Office of Indian Affairs"
January 17th, 1881.

"This is to certify, that [Paw-as-wa-tish], or [Jimmy Cross] a member of the Puyallup tribe of Indians, having expressed a desire to adopt habits of settled industry, and to receive an allotment of lands for the purposes of cultivation, as provided for in the 6th article of the treaty with said tribe, concluded December 26th, 1854 (Vol. 10 page 1133), is entitled to 80 acres of land that he has selected for such purposes [legal description] containing 80 acres.]

The said [Paw-aw-wa-tish], or [Jimmy Cross], is entitled to and may take immediate possession of said land and occupy the same, and the United States guarantees such possession, and will hold the title thereto in trust for the exclusive use and benefit of himself and his heirs so long as such occupancy shall continue.

This certificate is not assignable except to the United States, or to other members of the tribe under such rules and regulations as may be hereafter prescribed by the Secretary of the Interior, and the said [Paw-aw-wa-tish], or [Jimmy Cross], is expressly prohibited from assigning or attempting to assign the same, and from selling or transferring the said land or disposing of the same, or any interest therein, to any person or persons whomsoever (except as above named) under penalty of an entire forfeiture thereof.

E.M. Marble, Acting Commissioner".

VII

It is my knowledge directly from the known oral history and traditions of the Puyallup tribe of which I am most familiar that my grandfather and many other treaty assignees of allotted land were fearful after 1881 of a treaty required relocation to the South Prarie area should the United States President be persuaded by on going efforts of white politicians and businessmen in Taco-

ma, Pierce County, and State of Washington to do this to us. The Puyallup Indian allottees including my grandfather therefore began to "cry out" to the President through the Indian Bureau for 6th Article Medicine Creek Treaty provided for permanent homes patents as the means to protect against relocation. Thereby being able to enjoy our ancestral home land and participate in the growing scene of prosperity around it, free of taxes. I learned very early in my life, 5 years old, that treaty Indians except for Puyallup Indians were state tax and regulation free in every sense and this fact promoted survival and even prosperity of these other tribes as well as, freeing them from the continuting legal oriented dialogue about protecting or advancing their treaty/legal position as we Puyallups have had to constantly live with. From this I learned why my many relatives were so bitter including my mother, Hattie Cross.

VII

The Puyallup allottees were successful in securing Congressional approval and funding for the express issuance of "permanent homes" patents according to the Appropriation Act of July 4, 1884 (23 Stat. 76, 88-89). Pursuant to this act the land office undertook to technically draft the language of the "permanent homes" 6th Article Medicine Creek Treaty-patents. In 1886, President Cleveland signed and issued these patents to the Puyallup allottees holding Certificates of Assignment made in 1881. When the United States General land office technical draftor(s) of this patent drew it up, they made several fundamental errors in their legally presumed effort to conform the patent language to the reality of Medicine Creek Treaty's 6th Article treaty with the Omahas "so far as the same may be applicable." These errors are thus exposed as: inserting provisions which are inconsistent with the "permanent home" guarantees made to the Indian treaty signors clearly embodied in the 6th Article of the Medicine Creek Treaty. And furthermore leaving out incorporated provisions which were supportive of and therefor "applicable" to the "permanent homes"

patent purporting to patent land subject to a "stipulation" in the 6th Article Treaty with the Omahas limiting aliening or leasing for over two years pernament homes patented land until these restrictive conditions referred to as "restrictions" are removed by some Act of the State legislature, coupled, with the consent of the United States Congress, could only apply actually to non patented land, not assigned for "permanent homes", and thus are not "applicable" provisions to be incorporated into the 6th Article of the Medicine Creek Treaty.

Also it should be noted that the actual language of the 6th Article of the Treaty with the Omahas uses not the word "stipulation" but instead states "conditioned" that the said tract shall not be aliened or leased for a longer term than two years, followed by the express federal recognition of right of exemption from state taxes, a vested right which clearly by its very nature is not a restrictive condition, thus the removal of conditions (plural), language where "applicable" are those upon aliening and leasing only those being by the very nature negative or restrictive conditions. But only the restrictive condition (restriction) on leasing could possible be applicable to permanent homes patented land, whereas the restrictions upon aliening and leasing would be "applicable" to "residue" or surplus land only as defined in the incorporated provisions of the 6th Article, Treaty with the Omahas to mean land left over after "permanent homes" were assigned.

IX

It is a both fact and a legal fact of great significance, I believe, that no patent in fee like that provided for in the General Allotment of 1887 (24. Stat 388) was ever issued to my grandfather or any of his descendants including myself. This is not to say however that the Medicine Creek Treaty of 1854 by any fair interpretation would allow for the same under certain circumstances, because it could not be so, without breaking the understanding my Indian ancestors including my grandfather had with the United States Government about "permanent homes forever" as directly

promised by Governor Issac Stevens in 1854 at treaty time. In fact when the treaty was made according to the oral traditions and history of the Puyallup tribe, the tribal Indians that were present asked Governor Issac Stevens how long the "contract" or "agreement" would last and he, the Governor replied: "As long as the sun shines and the rivers flow".

This has been completely confirmed by the record and transcript of testimonies in *Duwamish et al v. United States*, 79 Ct. C.L. 530 (1934)) of knowledgeable survivors (in 1926) of treaty times in 1854 and their pertinent experiences thereafter:

Mary Anne Dean, a Puyallup Indian 64 years of age in 1926 deposed at pages 677 and 678 of the record that:

"...

Question. Do you know how many Puyallup people who failed to get allotments of land?

Answer. There were a lot of very old people that were too old to be given allotment, and then there were a lot of young people that the agent told them that they were too young to get an allotment.

Question. Did you try to get an allotment for yourself and the children?

Answer. There was no need of trying because the land was all taken up.

Question. Have the suffered great hardships from not being able to get allotments?

Answer. They did have hardships on account of lack of this carrying out of the contract with the Governor.

By the Commissioner:

Question. Do you know of any other matter relative to the claim in question? If you do state it.

Answer. She feels hurt over this reason that her father suffered with those that fought for their home. They thought in the beginning it was their homes and it was their country. When the white people came to this country they were put to all this trouble and hardship. That is all.

Lucy Gurand, a Puyallup Indian (Snohomish band) of about age 85 years in 1926 deposed at pages 647, 658 and 649 of record (Court of Claims) that:

Question. Have you lived in the country of the Puyallup Indians all of your lifetime?

Answer. Yes, Sir, right down here at the mouth of the river.

Question. Did you get an allotment of land, Lucy

Answer. She has an allotment.

Question. Are there many of the Puyallup Indians who haven't any allotments?

Answer. Yes Sir.

Question. Why didn't they get allotments?

Answer. No land to take up, they were short.

Question. Were the people of your tribe willing to go upon an allotment of land and live upon it as a permanent home if they could get it?

Answer. They were perfectly willing to go upon allotment, but they couldn't.

Question. And live upon it as a permanent home?

Answer. Yes Sir.

...

Question. Did they understand that they were going to get lands for homes and farms?

Answer. Not at that treaty; but after the war they got the Indians together and they made them select their reservations.

Joseph Swyell, a Puyallup Indian about 83 years of age in 1926 deposed at pages 670 to 674 of record that:

Direct examination by Mr. Griffin.

Question. Were you old enough to be taken and made a prisoner during the war?

Answer. He was one of the prisoners.

Question. Has the reservation of the Puyallup Indians been cut down from the way it was originally established?

Answer. The original reservation was from Brown's Point hitting the lower end of Pacific Avenue and going southeasaterly to Wapato Lake and coming down here by Alderton, to the poor farm and going down northwesterly to about Three Tree Point.

Question. Who gave the Puyallup Indians that reservation?

Answer. He said there is nobody gave it to us, but it was our land.

...

Question. Did your father or your mother or your sisters or any of your children get any allotment of land?

Answer. Yes Sir.

Question. Did Governor Stevens promise these Indians allotments of land for themselves and their children as long as the sun would shine and as long as the rivers would flow?

Answer. Yes Sir, that is what Stevens said.

Louisa Duette, a Puyallup Indian, age in 1926 unknown but she had reached the age of reason by 1854. She deposed at pages 641 and 642 (Court of Claims) that:

"...

Question. Did you hear what he said when he interpreted the treaty to the Indians?

Answer. Yes, Sir; She understood.

Question. When he interpreted the treaty, what rights did the Indians receive to allotments of land by that treaty, as you understand it?

...

Answer. They understood that they were to get all the land they want, and were pleased at that.

Question. Did they interpret the treaty as giving lands to the children as well as to the grown people?

Answer. Yes.

Question. And to the women as well as the men?

Answer. Yes.

Question. Were they to get lands big enough for farms, for all of them?

Answer. Yes, Sir.

Question. Was that the way the treaty was interpreted to the Indians and the way they understood it; those who could understand it at all?

Answer. Yes, they understood it, some of them.

Question. Did you ever get an allotment of land anywhere?

Answer. She never got any.

Question. Were there many of the Puyallup Indians who got no land or allotments?

Answer. There were many.

Question. Were they willing to accept allotments of land and go on them and live on them for permanent homes, if they could get them?

Answer. Yes, sir, they were willing.

Question. Did your father ever get allotments of land?

Answer. No, Sir.

X

Clearly the record of the time (1881-1886) confirms that the Puyallup land allotments were both treaty land allotments and were so allotted for permanent homes per 6th Article of Medicine Creek Treaty. I have personally received from the Archives maintained by the Puyallup tribe at its headquarters from one Judy Wright, tribal Archivist a copy of an original authentic letter from the local Indian agent of the time, Edwin Eells to the Commissioner of Indian Affairs submitting the "Allotment Rolls" for the Puyallup allottes who were to receive letters patent confirming and vesting their permanent home land allotment in accord with the "Certificates of Assignment" already issued them (including affiant's grandfather) in 1881. As I have related above herein these letters patent arising directly from the "applicable" provision of the 6th Article of Medicine Creek treaty were highly desird by my tribespeople to avoid an abrupt and cruel relocation process which had been threatened. This letter is attached hereto as Exhibit "A".

XI

Neither my grandfather, my father, mother, nor myself have ever voluntarily accepted the taxing jurisdiction of the State over our permanent home allotment/patented land. At all times my family members before me paid illegally levied State taxes upon our allotted permanent home in which the United States was at all times to the present time legal trustee thereof, under the coercion and duress of threatened foreclosure if we did not. It was this very threat of foreclosure coupled with the silence of the United States Government agency charged directly with our protections that compelled the "sales" of all the other allottees'

permanent home land save for several other families who could somehow afford through the years to pay the County's illegally exacted real property taxes.

XII

It was always my grandfather Jimmy Cross' expressed intention that he and the rest of the family hold on to all of the treaty allotment no matter what happened until the political climate changed and we could get the United States Government to protect us. This has not happened yet, as it did in 1974 respecting our likewise taken away fishing rights. I have in mind here the famous "Judge Boldt" decision. Obviously under the Medicine Creek treaty of 1854 under which I have tried to live all of my life, assignments or allotments including issuance of letters patent therefor was accomplished in 1886 fully one year before the Indian land base destroying congressional enactment known as the "Dawes" or General Allotment Act of 1887. Every effort was made to bring my people and relatives of the time under its crushing spirit and terms. Even though it could not apply to turn the 1886 permanent home patent conveying and confirming only a vested familial use and occupancy interest into a patent in fee or restricted fee as does the General Allotment Act of 1887, but even here only after the trust period expires. The trust period can never be legally shortened at the whim of the great United States Congress. The Puyallup trust period is so long as use and occupancy continues.

Although some family members such as George Cross II had moved away from the use and occupancy of this land, some of us including myself have not. Neither had my grandfather, grandmother, father, and mother done so at any time.

I have been made aware of State and County contentions that Congress unilaterally authorized the sale of "surplus" permanent home land and then the rest of an remainder of the permanent home land (this latter position could hardly have merit because of expressed Congressional intent to the contrary), but

the treaty itself makes this type of enactment void in violation of the Fifth Amendment, United States Constitution. In fact there never was any "residue" or surplus land in the first place to be sold because the Indian Bureau did not assign land for permanent homes to the limit of the lands available.

FURTHER AFFIANT SAYETH NAUGHT

/s/ Silas V. Cross
Silas V. Cross
AFFIANT

SUBSCRIBED and sworn to before me this ____ day of September, 1989.

/s/
NOTARY PUBLIC
AT TACOMA, WASHINGTON

APPENDIX E
AFFIDAVIT OF SILAS V. CROSS IN OPPOSITION
TO STATE'S MOTION FOR SUMMARY JUDGMENT
WITH ITS EXHIBIT "A" ATTACHED THERETO

UNITED STATES DISTRICT COURT
AT TACOMA
WESTERN DISTRICT OF WASHINGTON

Silas V. Cross *Plaintiff* v. [Pierce County], State of Washington; and Brian Boyle, Commissioner of Public Land; Washington State University, its Board of Regents and Secretary, *Defendants.*	No. C88-410TB AFFIDAVIT OF SILAS V. CROSS IN OPPOSITION TO STATE'S MOTION FOR SUMMARY JUDGMENT

AFFIDAVIT

STATE OF WASHINGTON |
COUNTY OF PIERCE | ss

I, Silas V. Cross, being first duly sworn on oath deposes and says:

I

That he is the Co-Plaintiff in the above entitled action and make this sworn Affidavit of fact in support of his opposition to state's Motion for Summary Judgment.

II

That affiant was born November 2, 1918 on the land originally allotted to his grandfather, Jimmy Cross in 1881. At the time of the Medicine Creek Treaty of 1984 (10 Stat. 1132) said Jimmy Cross was a Puyallup tribal member whose tribal name was Pak-aw-wa-tish. He was 2 years old then. Jimmy Cross was also born and raised on the South West corner of his later allotted land. Affiant, along with Co-Plaintiff, Vernon Cross, has lived in tribal relations with the Puyallup tribe all of his life. In the 1950's and 1970's, Affiant served on the Puyallup tribal council covering a period of 17 years.

III

Jimmy Cross and Lucy Cross had four tribally recognized and enrolled children. George I, deceased in 1887, Henry, George II born in 1890 and Silas. The latter is the father of Affiant.

IV

In 1916, Lucy Cross, died and as a result a Probate Court applying State of Washington Community property law of the time confirmed George Cross II as the owners of 30 acres of Jimmy Cross' original "permanent home" allotment subject to the latters' control for his lifetime. Jimmy Cross died in 1932. George Cross II thereafter, who was then living off of the Puyallup Indian reservation and had been for a number of years without resuming or locating himself upon said 30 acres of "permanent home" land presumed to sell, convey and transfer the same to one Ben Andre in 1938 who in turn transferred or conveyed the same to the State of Washington's experimental station, in 1941. The State of Washington by its Experimental Station in the Puyallup Valley at Fife, Wash, caused the document of said conveyance to be recorded in the State of Washington' (Pierce County) public real property records as the claimed legal owner thereof. There is no Secretary of Interior or delegate approval for the purported deed of George Cross II which was ever requested, made, given or

entered.

V

That in 1874, a assignment of permanent home land was made to Jimmy Cross for his, and his present and future family's use perpetually subject to the condition of perpetual familial maintenance of use and occupancy of the assigned land. This assignment under the terms of the 6th Article Medicine Creek Treaty of 1854 was officially confirmed by a Certificate of Assignment issued to my grandfather Jimmy Cross in 1881 in accordance with the treaty signors understanding of the character of the permanent homes land to be assigned in severalty. Both my grandfather Jimmy Cross and father Silas Cross had told me many times when I was young and even after about receipt of this valuable Certificate of Assignment under which my grandfather was to be assured of the possession and control of his treaty assigned 80 acres for his, and his family descendants use *in perpetuity.* Virtually all other fortunate Puyallup Indian allottees were given Certificates of Assignment for their respective home allotments as well at the same time. It was also understood and relied upon that the United States government would hold the pertinent legal title even though the jurisdiction over the soil, paramount title was a actually vested in the Puyallup tribe as through the circumstances of an earlier United States retrocession in 1856.

VI

When I was growing up from 1918 and upwards, but after 1929, I learned from my mother, Hattie Cross that a true and correct copy of my grandfather's Certificate of Assignemt except for the names of assignees was in a law book at the United States Court house in Seattle reporting the case of *George Bird. v. Terry.* Bird being a Puyallup tribal Indian and Terry an Indian agent. The citation for this case I later found out was 129 Fed. 472 (1903) and at page 473 in it recited the actual verbatim terms of my grandfather's Certificate of Assignment of permanent home land,

these being identical to all other Certificates of Assignment of 1881.

[No. 69] Department of the Interior
"Office of Indian Affairs,"
January 17th, 1881

"This is to certify, that [Paw-aw-wa-tish], or [Jimmy Cross] a member of the Puyallup tribe of Indians, having expressed a desire to adopt habits of settled industry, and to receive an allotment of lands for the purposes of cultivation, as provided for in the 6th article of the treaty with said tribe, concluded December 26th, 1854 (Vol. 10 page 1133), is entitled to 80 acres of land that he has selected for such purposes [legal description] containing 80 acres.]

The said [Paw-aw-wa-tish], or [Jimmy Cross], is entitled to and may take immediate possession of said land and occupy the same, and the United States guarantees such possession, and will hold the title thereto in trust for the exclusive use and benefit of himself and his heirs so long as such occupancy shall continue.

This certificate is not assignable except to the United States, or to other members of the tribe under such rules and regulations as may be hereafter prescribed by the Secretary of the Interior, and the said [Paw-aw-wa-tish], or [Jimmy Cross], is expressly prohibited from assigning or attempting to assign the same, and from selling or transferring the said land or disposing of the same, or any interest therein, to any person or persons whomsoever (except as above named) under penalty of an entire forfeiture thereof.

E.M. Marble, Acting Commissioner".

VII

It is my knowledge directly from the known oral history and

traditions of the Puyallup tribe of which I am most familiar that my grandfather and many other treaty assignees of allotted land were fearful after 1881 of a treaty required relocation to the South Prarie area should the United States President be persuaded by on going efforts of white policiticans and businessmen in Tacoma, Pierce County, and State of Washington to do this to us. The Puyallup Indian allottees including my grandfather therefore began to "cry out" to the President through the Indian Bureau for 6th Article Medicine Creek Treaty provided for permanent homes patents as the means to protect against relocation. Thereby being able to enjoy our ancestral home land and participate in the growing scene of prosperity around it, free of taxes. I learned very early in my life, 5 years old, that treaty Indians except for Puyallup Indians were state tax and regulation free in every sense and this fact promoted survival and even prosperity of these other tribes as well as, freeing them from the continuing legal oriented dialogue about protecting or advancing their treaty/legal position as we Puyuallups have had to constantly live with. From this I learned why my many relatives were so bitter including my mother, Hattie Cross.

VIII

The Puyallup allottees were successful in securing Congressional approval and funding for the express issuance of "permanent homes" patents according to the Appropriation Act of July 4, 1884 (23 Stat. 76, 88-89). Pursuant to this act the land office undertook to technically draft the language of the "permanent homes" 6th Article Medicine Creek Treaty-patents. In 1886, President Cleveland signed and issued these patents to the Puyallup allottees holding Certificates of Assignment made in 1881. When the United States General land office technical draftor(s) of this patent drew it up, they made several fundamental errors in their legally presumed effort to conform the patent language to the reality of Medicine Creek Treaty's 6th Article incorporating by references only those provision of the 6th Article treaty with the

Omahas "so far as the same may be applicable." These errors are thus exposed as: inserting provisions which are inconsistent with the "permanent home" guarantees made to the Indian treaty signors clearly embodies in the 6th Article of Medicine Creek Treaty. And furthermore leaving out incorporated provisions which were supportive of and therefor "applicable" to the "permanent homes" guarantee. E.g. the language in these "permanent home" patent purporting to patent land subject to a "stipulation" in the 6th Article Treaty with the Omahas limiting aliening or leasing for over two years permanent homes patented land until these restrictive conditions referred to as "restrictions" are removed by some Act of the State legislature, coupled, with the consent of the United States Congress, could only apply actually to non patented land, not assigned for "permanent homes", and thus are not "applicable" provisions to be incorporated into the 6th Article of the Medicine Creek Treaty.

Also it should be noted that the actual language of the 6th Article of the Treaty with the Omahas uses not the word "stipulation" but instead states "conditioned" that the said tract shall not be aliened or leased for a longer term than two years, followed by the express federal recognition of right of exemption from state taxes, a vested right which clearly by its very nature is not a restrictive condition, thus the removal of conditions (plural), language where "applicable" are those upon aliening and leasing only these being by the very nature negative or restrictive conditions. But only the restrictive condition (restriction) on leasing could possibly (sic) be applicable to permanent homes patented land, whereas the restrictions upon aliening and leasing would be "applicable" to "residue" or surplus land only as defined in the incorporated provisions of the 6th Article, Treaty with the Omahas to mean hand left over after "permanent homes" were assigned.

IX

It is a both a fact and a legal fact of great significance, I believe, that no patent in fee like that provided for in the General

Allotment of 1887 (24 Stat. 388) was ever issued to my grandfather or any of his descendants including myself. This is not to say however that the Medicine Creek Treaty of 1854 by any fair interpretation would allow for the same under certain circumstances, because it could not be so, without breaking the understanding my Indian ancestors including my grandfather had with the United States Government about "permanent homes forever" as directly promised by Governor Issac Stevens in 1854 at treaty time. In fact when the treaty was made according to the oral traditions and history of the Puyallup tribe, the tribal Indians that were present asked Governor Issac Stevens how long the "contract" or "agreement" would last and he, the Governor replied: "As long as the sun shines and the rivers flow".

This has been completely confirmed by the record and transcript of testimonies in *Duwamish et al v. United States*, 79 Ct. C.L. 530 (1934)) of knowledgable survivors (in 1926) of treaty-times in 1854 and their pertinent experiences thereafter:

Mary Anne Dean, a Puyallup Indian 64 years of age in 1926 deposed at pages 677 and 678 of the record that:

> "...
> Question. Do you know how many Puyallup people who failed to get allotments of land?
>
> Answer. There were a lot of very old people that were too old to be given allotment, and then there were a lot of young people that the agent told them that they were too young to get an allotment.
>
> Question. Did you try to get an allotment for yourself and you children?
>
> Answer. There was no need of trying because the land was all taken up.

Question. Have the suffered great hardships from not being able to get allotments?

Answer. They did have hardships on account of lack of this carrying out of the contract with the Governor.

By the Commissioner:

Question. Do you know of any other matter relative to the claim in question? If you do state it.

Answer. She feels hurt over this reason that her father suffered with those that fought for their home. They thought in the beginning it was their homes and it was their country. When the white people came to this country they were put to all this trouble and hardship. That is all.

Lucy Gurand, a Puyallup Indian (Shomamish band) of about age 85 years in 1926 deposed at pages 646, 647, 648 and 649 of record (Court of Claims) that:

Question. Have you lived in the country of the Puyallup Indians all of your lifetime?

Answer. Yes, Sir, right down here at the mouth of the river.

Question. Did you get an allotment of land, Lucy

Answer. She has an allotment.

Question. Are there many of the Puyallup Indians who haven't any allotments?

Answer. Yes Sir.

Question. Why didn't they get allotments?

Answer. No land to take up, they were short.

Question. Were the people of your tribe willing to go upon an allotment of land and live upon it as a permanent home if they could get it?

Answer. They were perfectly willing to go upon allotment, but they couldn't.

Question. And live upon it as a permanent home?

Answer. Yes Sir.

...

Question. Did they understand that they were going to get lands for homes and farms?

Answer. Not at that treaty; but after the war they got the Indians together and they made them select their reservations.

Joseph Swyell, a Puyallup Indian about 83 years of age in 1926 deposed at pages 670 to 674 of record that:

Direct examination by Mr. Griffin.

Question. Were you old enough to be taken and made a prisoner during the war?

Answer. He was one of the prisoners.

Question. Has the reservation of the Puyallup Indians been cut down from the way it was originally established?

Answer. The original reservation was from Brown's Point hitting the lower end of Pacific Avenue and going southeasterly to Wapato Lake and coming down here by Alderton, to the poor farm and going down northwesterly to about Three Tree Point.

Question. Who gave the Puyallup Indians that reservation?

Answer. He said is nobody gave it to us, but it (sic) was our land.

...

Question. Did your father or mother or your sisters or any of your children get any allotment of land?

Answer. Yes Sir.

Question. Did Governor Stevens promise these Indians allotments of land for themselves and their children as long as the sun would shine and as long as the rivers would flow?

Answer. Yes Sir, that is what Stevens said.

Louisa Duette, a Puyallup Indians, age in 1926 unknown but she had reached the age of reason by 1854. She deposed at pages 641 and 642 (Court of Claims) that:

"...

Question. Did you hear what he said when he interpreted the treaty to the Indians?

Answer. Yes, Sir; She understood.

Question. When he interpreted the treaty, what rights did the

Indians receive to allotments of land by that treaty, as you understand it?

...

Answer. They understood that they were to get all the land they want, and were pleased at that.

Question. Did they interpret the treaty as giving lands to the children as well as to the grown people?

Answer. Yes.

Question. And to the women as well as the men?

Answer. Yes.

Question. Were they to get lands big enough for farms, for all of them?

Answer. Yes, Sir.

Question. Was that the way the treaty was interpreted to the Indians and the say they understood it; those who could understand it at all?

Answer. Yes, they understood it, some of them.

Question. Did you ever get an allotment of land anywhere?

Answer. She never got any.

Question. Were there many of the Puyallup Indians who got no land or allotments?

Answer. There were many.

Question. Were they willing to accept allotments of land and go on them and live on them for permanent homes, if they could get them?

Answer. Yes, sir, they were willing.

Question. Did you father ever get allotments of land?

Answer. No, Sir.

X

Clearly the record of the time (1881-1886) confirms that the Puyallup land allotment were both treaty allotments and were so allotted for permanent homes per 6th Article of Medicine Creek Treaty. I have personally received from the Archives maintained by the Puyallup tribe at its headquarters from one Judy Wright, tribal Archivist a copy of an original and authentic letter from the local Indian agent of the time, Edwin Eells to the Commissioner of Indian Affairs submitting the "Allotment Rolls" for the Puyallup allottes who were to receive letters patent confirming and vesting their permanent home land allotment in accord with the "Certificates of Assignment" already issued them (including my grandfather) in 1881. As I have related above herein these letters patent arising directly from the "applicable" provision of the 6th Article of Medicine Creek treaty were highly desired by my tribespeople to avoid an abrupt and cruel relocation process which had been threatened. This letter is attached hereto as Exhibit "A".

XI

Neither my grandfather, my father, mother, nor myself have ever voluntarily accepted the taxing jurisdiction of the State over our permanent home allotment/patented land. At all times my family members before me and myself paid illegally levied State

taxes upon our allotted permanent home land in which the United States was at all times to the present time legal trustee thereof, under the coercion and duress of threatened foreclosure if we did not. It was this very threat of foreclosure coupled with the silence of the United States Government agency charged directly with our protections that compelled the "sales" of all the other allottees' permanent home land save for several other families who could somehow afford through the years to pay the County's illegally exacted real property taxes.

XII

It was always my grandfather Jimmy Cross' expressed intention that he and the rest of the family hold on to all of the treaty allotment no matter what happened until the political climate changed and we could get the United States Government to protect us. This has not happened yet, as it did in 1974 respecting our likewise taken away fishing rights. I have in mind here the famous "Judge Boldt" decision. Obviously under the Medicine Creek treaty of 1854 under which I have tried to live all of my life, assignments or allotments of permanent home land arose under its 6th Article. These allotments including issuance of letters patent therefor was accomplished in 1886 fully one year before the Indian land base destroying congressional enactment known as the "Dawes" or General Allotment Act of 1887. Every effort was made to bring my people and relatives of the time under its crushing spirit and terms. Even though it could not apply to turn the 1886 permanent home patent conveying and confirming only a vested familial use and occupancy interest into a patent in fee or restricted fee as does the General Allotment Act of 1887, but even here only after the trust period expires. The trust period can never be legally shortened at the whim of the great United States Congress. The Puyallup trust period is so long as use and occupancy continues.

Although some family members as George Cross II had moved away from the use and occupancy of this land, some of us including

myself have not. Neither had my grandfather, grandmother, father, and mother done so at any time.

XIII

I have been made aware of State and County contentions that Congress unilaterally authorized the sale of "surplus" permanent home land and then the rest and remainder of the permanent home land (this latter position could hardly have merit because of expressed Congressional intent to the contrary), but the treaty itself makes this type of enactment void in violation of the Fifth Amendment, United States Constitution. In fact there never was any "residue" or surplus land in the first place to be sold because the Indian Bureau did not assign land for permanent homes to the limit of the lands available.

XIV

This case does in no way involve the "Negotiation", because it does not involve individual claims. Further this "Negotiation" has not been consummated.

XV

The State's experimental station usage of the 30 acres of land involved herein is merely one of growing corn for silage uses at its other experimental station or farm wherein it operates a dairy farm. Obviously this is not the only source of silage for this farm. This is hardly a critical matter.

In fact, no one lives on this property and it is not protected from vandalism.

FURTHER AFFIANT SAYETH NAUGHT

/s/ SC

Silas V. Cross
AFFIANT

EXHIBIT "A"

GENERAL SERVICES ADMINISTRATION
National Archives and Records Service

To all to whom these presents shall come, Greeting:

By virtue of the authority vested in me by the Administrator of General Services, I certify on his behalf, under the seal of the National Archives of the United States, that the attached reproduction(s) is a true and correct copy of documents in his custody.

SIGNATURE /s/ Harold T. Pinkett	
NAME Harold T. Pinkett	DATE 2/14/1979
TITLE Chief, Legislative and Natural Resources Branch	
NAME AND ADDRESS OF DEPOSITORY The National Archives Washington, D.C. 20408	

OFFICE OF INDIAN AFFAIRS
Rec. March 27, 1884

Nisqually & Skokomish
Agency W.T.
New Tacoma, Mch. 15/84
Eells, Edwin U.S. Ind. Agt.
Notice of Transmittal of
Puyallup rolls of those
entitled to patents for lands
allotted them, with marks thereon

UNITED STATES INDIAN SERVICE
Nisqually and Skokomish Agency,
Near Tacoma W.T. March 15, 1884

Hon. H. Price
Commr. Ind. Affairs
Washington City D.C.

Sir

I have the honor to transmit herewith by...Allotment Rolls for the Indians of the Puyallup Reservation. In accordance with instructions contained in office letter dated June 13" 1883, many of the allotments are in separate tracts giving both a bottom piece and a high timber tract to a single individual. In other cases a good bottom farm has been given and also a tide flat tract which is too low to live upon instead of the high timber tract. In a large number of instances where persons have allotment certificates for forty acres, they have been given other land besides. And yet have not as much given them as the Treaty allows. Many of the original allottees have died and in most cases these have descended to the heirs. In other cases sales and transfers have been made by one Indian to another.

The right to do this is implied in the words of the Allotment Certificate which reads, "This Certificate is not assignable except to the United States or to other members of the tribe." The land has been all allotted except the amount reserved for school purposes. In regard to that tract formerly reserved for a church lot it was not found to be centrally located, and their church has since been built on a part of that reserved for the school farm, and the former tract re alloted to an Indian.

I also forward a map showing the location of the several allotments so that any small error if any have occurred may be remedied there without the delay of returning the papers here again. Hoping that these may prove satisfactory and that the Indians may soon receive patents for their homes I have the honor to be

Very Respectfully
Your Ob't. Srv't.
Edwin Eells
U.S. Ind. Agent.

APPENDIX F
COPY OF *PERMANENT HOME* PATENT ISSUED
TO JIMMY CROSS IN 1886

THE UNITED STATES OF AMERICA

To all to whom these presents shall come, Greeting:

Whereas, by the sixth article of the treaty concluded on the twenty-sixth day of December, anno Domini one thousand eight hundred and fifty-four, between Isaac I. Stevens, governor and superindendent of Indian Affairs of Washington Territory, on the part of the United States, and the chiefs, headmen, and delegates of the Nisqually, Puyallup, Steilacoom, Squawksin, S'Homamish, Steh-chase, T'Peeksin, Squi-aitl, and Sa-heh-wamish tribes and bands of Indians, it is provided that the President, "at his discretion, cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the *same as a permanent home*, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable."

AND WHEREAS there has been deposited in the General Land Office of the United States an order bearing date January 20, 1886 from the Secretary of the Interior, accompanied by a Return dated October 30, 1884 from the Office of Indian Affairs, witha list approved October 23, 1884 by the President of the United States showing the names of members of the Puyallup band of Indians who have made selections of land in accordance with the provisions of the said treaties, in which list the following tracts of land have been designated as the selection of Jimmy Cross the head of a family consisting of himself, Lucy, Henry and George, viz: The southeast quarter of the southwest quarter of section eight (40.00 acres) and the northeast quarter of the northwest quarter

of section seventeen (40.00 acres) in township Twenty North of range four east of the Willamette Meridian, Washington Territory, containing in the aggregate eighty acres.

NOW KNOW YE, That the United States of America, in consideration of the premises and in accordance with the directions of the President of the United States under the aforesaid sixth article of the treaty of the sixteenth day of March, anno Domini one thousand eight hundred and fifty-four, with the Omaha Indians, has given and granted, and by these presents does give and grant, unto the said Jimmy Cross as the head of the family as aforesaid and to his heirs, the tracts of land above described, but with the stipulation contained in the said sixth article of the treaty with the Omaha Indians, that the said tracts "shall not be aliened or leased for a longer term than two years; and shall be exempt from the levy, sale, or forfeiture, which conditions shall continue in force until a State constitution embracing such lands within its boundaries shall have been formed and the legislature of the State shall remove the restrictions," and "no State legislature shall remove the restrictions" — "without the consent of Congress."

TO HAVE AND TO HOLD the said tracts of land, with the appurtenances unto the said Jimmy Cross as the head of the family as aforesaid and to his heirs forever, with the stipulation aforesaid.

IN TESTIMONY WHEREOF I, Grover Cleveland, President of the United States, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

GIVEN under my hand, at the city of Washington, this thirtieth day of January, in the year of our Lord one thousand eight hundred and eighty-six, and of the Independence of the United States the one hundred and tenth.

By the President: Grover Cleveland
By M.McKean, *Secretary*
S.W. Clark *Recorder of the General Land Office.*
Recorded Vol. 1 p. 122

APPENDIX G
EXCERPT OF APPELLANTS' (PETITIONERS') OPENING BRIEF — "FACTS RELEVANT TO THE ISSUES PRESENTED" SECTION

C. "Facts Relevant to the Issues Presented

Appellants Silas Cross and Vernon Cross are both Puyallup Tribal Indians who all times pertinent herein have lived in tribal relations with said Tribe. The Puyallup Tribe itself is a co-signor of the Medicine Creek Treaty of 1854. This treaty was duly ratified in 1855 by Act of Congress in 10 Stat. 1132. Pursuant to Article 6 of said Medicine Creek Treaty of 1854 Appellants' grandfather, and great grandfather respectively, Jimmy Cross was issued a "Certificate of Assignment" in 1881 for an allotment of 80 acres of land within the enlarged boundaries of the Puyallup Indian Reservation. This said "Certificate of Assignment" of allotted land to one Jimmy Cross recited therein that the land so transferred to Jimmy Cross in severalty for his use and occupancy was to be subject to the United States' position that it was holding the legal title to the land so transferred in trust for a potential perpetual duration, "so long as such occupancy shall continue." Use and occupancy by some of Jimmy Cross' direct descandents have continued to this very date including that of Appellants. However, George Cross II being first vested with use and occupancy upon the demise of Jimmy Cross as one of his sons thereafter abandoned his possessory right therein. And furthermore thereafter purported to convey by deed a fee simple absolute interest in the subject land to a non-Indian who in turn conveyed by deed the same to Appellees.

This land so allotted pursuant to Article 6 of the Medicine Creek Treaty, to Jimmy Cross was as and for a permanent home as specifically provided for. It was the intention of the Indian Treaty co-signers to the Medicine Creek Treaty, that the lands reserved by the Medicine Creek Indians tribes were to remain theirs and subject to their control forever. The representatives of United

States of America as co-signers to the Medicine Creek Treaty likewise intended that the lands reserved by the Medicine Creek Indian tribes and bands would remain theirs and subject to their control forever.

It is clear that at treaty time, at the Medicine Creek Treaty site located near what is now Olympia, Washington, the United States representatives were seeking only a sovereign title land cession from the Indian tribes and bands involved and had no desire or claim for the future extension of Territorial or State jurisdiction over land reserved for the exclusive use of the Indians reserved, or for the extinguishment in any way of the control the Medicine Creek tribes and bands held over these reserved lands.

That while Appellants' respective *permanent home* allotted/patented land is located within the boundaries of the Puyallup Indian Reservation, more specifically it is located within the boundaries of the enlarged Puyallup Reservation as opposed to being located within the boundaries of the original Puyallup Reservation. The enlarged Reservation was created directly from the local Indian war of 1855-56, which was concluded by the peace conference at Fox Island of 1856 wherein the United States Government representatives agreed to greatly enlarge the Puyallup Indian Reservation by making an appropriate retrocession of lands necessary for the enlargement. This retrocession agreement at Fox Island was confirmed and implemented by an "Executive Order" issued by United States President Pierce in 1857. This enlarged Reservation is remarkable in its character from that of the original Reservation for the reason that the original one of some 1200 acres only having been first conveyed by the Puyallup Tribe to the United States Government was then reconveyed to the Tribe through the "Medicine Creek Treaty" by its Article 2 as and for its "exclusive use and occupancy" only. However the result of the said Fox Island Conference of 1856 was for the United States to retrocede the land for the enlarged Reservation of some 10's of thousands of acres which then resumed its fundamental right to the soil, legal, and national character to be the

same as the said Article I lands held by them prior to their cession or conveyance by treaty to the United States. Thus the Puyallup Indian tribe along with the neighboring Nisqually Indian tribe as co-parties along with the United States to the Fox Island Conference are most uniquely situated among all recognized Indian tribes in the United States; *in that: they still hold paramount, sovereign jurisdiction over the soil title to the lands of their substantially enlarged reservations*. Of further significance is the fact that the United States of America has never made, or done any act by which it would have purported to take any of the Puyallup Indian reserved lands both the original reservation and the reservation as it is enlarged into the public domain of the United States. Accordingly no Public law or record of the same exists. Therefore no former Puyallup tribal land exists from which the United States Government if it so decided could transfer the title and control to the State of Washington. In 1884 the Congress of the United States by its Appropriation Act of July 4, 1884, 23 Stat. 76, 88-89 (Addendum "A") made available funds for Puyallup tribal trust allotted lands to be formally surveyed for the purpose of including the survey description in "permanent homes" trust patents as provided for by the 6th Article of the Medicine Creek Treaty were duly prepared and issued upon the signature of the President of the United States. (For true and correct copy thereof see Ex "A" of Cr 8 attached as Addemdum "B"). These "permanent homes" trust patents were for use and occupancy only, and by their very nature they were vested in the original allottees/patentees in this case one Jimmy Cross and his tribal descendants. By the terms of the 6th Article of the Medicine Creek Treaty and coupled together with the circumstances of the signing of the treaty itself no higher title other than use and occupancy in an individual Indian allottee was to ever be possibly contemplated or provided for. The full legal, paramount, right to, or jurisdiction over the soil to the allotted patented lands was in the Puyallup tribe itself forever or at least until the same be conquored from or ceded by the tribe. Even though the United States had taken

the position that this tribally owned sovereign land had a national character, for reasons of protection purposes it nonetheless held the same sovereign title in trust for the Puyallup Indian tribe or nation, and of course its duly enrolled members.

In 1889 the State of Washington's first legislature adopted a law authorizing its non-Indian citizens to settle upon and own land within the boundaries of the Indian reservations within the territory of the State of Washington, but of course in the case of the Puyallup tribe subject to the consent of the tribe and its control. It did this by effectively consenting legislatively to the removal of treaty restrictions that existed upon Indian tribes and their members from conveying or selling whatever interest they might own or possess in land to non-Indian settlers living within the boundaries of the reservation. This scheme also included the United States Congress, as it would have to consent legislatively to the settling and holding interests in tribally controlled lands within the Puyallup (Medicine Creek) Indian reservation as well. The Puyallup Indian tribe by the terms of Medicine Creek Treaty in Article II, would along with the Superintendent of Indian Affairs have to also consent to non-Indians residing within the boundaries of the reservation. The extent to which an interest in land could be actually in fee simple, subject however to the paramount title and jurisdiction to the Puyallup Trbe, owned by non-Puyallup Indian tribal members within the Puyallup Indian reservation is determined by the 6th Article of the Medicine Creek Treaty as this pertains strictly to the provisions of land *surplus or residue sales*. "Permanent home" trust allotments by their very nature and character could never be sold or transferred to anyone in fee simple absolute. In fact the use and occupancy right in the permanent homes allotted lands was permanently vested in the original allottee Jimmy Cross and his tribally affiliated descendants in this case Appellants by the 1886 "permanent home" patent which was consistent with the 6th Article of the Medicine Creek Treaty. The 6th Article of the Medicine Creek Treaty provides that provisions of the 6th Article with the Omahas (10 Stat. 1043)

shall be incorporated therein by reference but only "so far as the same may be applicable." Provision(s) of the 6th Article of the Treaty with the Omahas that maybe interpreted to divest a permanent home allottee of his or his tribal descendants' use and occupancy right or in any way subject him to the jurisdiction of the State of Washington land taxation would surely not be an "applicable" provision to the sixth Article of the Medicine Creek Treaty as a matter of historical fact. In 1893, Congress passed an Act in 27 Stat. 633 (1893) which by its terms authorized the sale (alienation) of Puyallup Indian allotted land *"not needed for homes"* to non-Puyallup tribal Indian persons. At all times Plaintiffs/Appellants' predecessors allotted/patented land was of the category of that *"needed for homes"*. This Act provided that any Indian land conveyed under the provisions of it to non-Indian persons be so conveyed by a Commissioner of the United States for that purpose. The Puyallup Indian land Commission by an express Congressional enactment in 1898 expired (29 Stat. 341). Therefore it existed no more, and was without any provision for further official acts whatsoever by any designee. With respect to the entire treaty "permanent home" trust allotment of Jimmy Cross of 80 acres none of said allotment has ever been out of the paramount right or jurisdiction over the soil ownership of the Puyallup Indian tribe and trust status with the United States from 1881 to the present time as a matter of treaty law. (Medicine Creek Treaty of 1854; Retrocession of 1856 at the Fox Island Council; Affirmed by United States Executive Order in 1857). No "patent in fee" as provided for generally in the General Allotment Act of 1887 (24 Stat. 388) has ever been issued to Jimmy Cross or any of his successors in interest with respect to said 80 acres of original treaty allotted land in the Puyallup Indian reservation. Moreover, in the circumstances of the Medicine Creek Treaty by its Article 6 thereof providing for a "permanent home" trust allotment/patent confirming a use and occupancy status or interest only, no "patent in fee" or "fee patent" could possibly be issuable to a Puyallup Indian allottee as the same might be under

the terms of the General Allotment Act of 1887 to a tribal Indian allottee of some other Indian tribe. This is especially true with respect to the "permanent home" trust patent involved in this case because it pre dates the passage of the General Allotment Act of 1887 (24 Stat. 388) by one year.

All of the foregoing facts presented are directly those which were before the U.S. District Court by way of two Affidavits of Silas V. Cross (CR 42 and 44), as these relate to the context of and Amended Complaint (CR 8) respectively.

APPENDIX H
EXCERPT OF FACTS SECTION FROM RESPONDENTS' ANSWERING BRIEF

C. "Counter-Statement of Facts

The Puyallup Indian Reservation was created by the Medicine Creek Treaty of 1854. 10 Stat. 1132. The Reservation was enlarged by Executive Order following the Fox Island Conference of 1856. The Medicine Creek Treaty provides in Article 6 for allotment of reservation land to individual Indians. (Addendum 1 is Article 6 of the Treaty. Article 6 of the Treaty with the Omahas, referred to therein, is attached as Addendum 2).

In 1884, Congress provided for the survey of the Puyallup Reservation for the purpose of assigning lots to individual Indians or families. 23 Stat. 76. (Addendum 3). In 1886, appellants' ancestor, Jimmie Cross, received a patent from the United States for land allotted to him pursuant to Article 6 of the Treaty of Medicine Creek. (Addendum 4. Addendum 5 is a more easily read transcription of the patent as submitted by appellants Cross in their Excerpts of Record to this court in their companion appeal No. 89-35224).

Shortly therafter, Congress enacted the General Allotment Act of 1887, 24 Stat. 388, which authorized the allotment of other Indian land throughout the United States. The Act also established the practice of setting a limit, then 25 years, on restrictions on alienation of lands allotted pursuant to the Act. (Now codified, as amended, in 25 U.S.C. § 331 *et seq.*) In 1893, Congress limited alienation restrictions on allotments to Puyallup Indians to ten years from the date of the legislation. 27 Stat. 633 (Addendum 6). In 1904, Congress acknowledged the expiration of that ten-year restriction period and confirmed that the restrictions on alienation of land allotted to Puyallup Indians were now removed. 33 Stat. 565 (Addendum 7).

Earlier, the Washington State Legislature, pursuant to Article 6 of the Medicine Creek Treaty, empowered Indians to alienate

allotted lands. The Washington Act was to take effect from and after the removal of all restrictions of alienation by the Congres of the United States. Washington Laws of 1890, pp 499-501. (Addendum 8).

The essential facts regarding chain of title are not in dispute. (*See* App. Br., p. 3) Beginning in 1919, a series of transactions occurred with respect to the Jimmie Cross patented land, including transfer by probate and warranty deeds. (Addenda 9-20 to CR 39.) As a result of this series of transactions the patented property was eventually included in the estate of Jimmie Cross, and upon his death his interest in the property was distributed in 1932, one-half each to surviving sons, Silas and George Cross.[1]

In 1938, George Cross and his wife conveyed two parcels to Ben. L. Andre, a non-Indian. (Addendum 19 to CR 39.) In 1941, Ben L. Andre conveyed these two parcels to the state of Washington. (Addenda 20A and B to CR 39.) These 1938 transactions are the focus of the appellants' ejectment claim. (CR 8, Ammended Complaint, § 3.2, pp. 19-20.)

Since 1941, the subject property has been used by Washington State University as part of an agricultural research station. WSU conducts important research at this facility that would be severely curtailed if the land is lost. (CR39, Affidavits attached thereto).

This lawsuit was filed August 12, 1988, some 84 years after all restraints on alienation of the Cross patent were removed by Congress, and 47 years after it was acquired by the State for use by Washington State University. Appellants and their relatives have lived adjacent to the WSU property over this entire period. (CR 8, Amended Complaint, § 2.8 and 2.14, pp. 9-10, 12.)"

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[1]George Cross is the paternal uncle of appellant Silas V. Cross. (CR 8, Amended Complaint, § 3.2 pp. 19-20)

APPENDIX I
EXCERPT FROM "APPELLANTS' OPENING BRIEF"
ARGUMENT SECTION pp 37-38 thereof

[p.37] After the *6th Article Medicine Creek Treaty* "permanent home" trust patents were issued in 1886, no later statutory enactment could issue in abrogation of the familial *vested* interests provided for thereunder in use and occupancy. See *Choate v. Trapp*, 224 U.S. 665 (1912), confirming that rights vested by Indian treaties or statutes can not be adversely affected by later statutory enactments without violating the Fifth Amendment, United States Constitution. The rule of *Choate v. Trapp*, supra, has been authoritatively expounded upon in "Federal Indian Law" handbook of 1958 published by the United States Government Printing Office under the supervision of the Department of Interior. At page 843 thereof in footnote 3, it is stated:

> "That decision, *[Choate v. Trapp]*, which dealt with taxation of [Indian allotted] land...established a limitation on the exercise of so called plenary power by Congress in Indian Affairs. While the United States Government, in the exercise of this plenary power over Indian tribes, can amend or repeal any statute, treaty, [p. 38] or agreement by enacting a subsequent statute, *it cannot arbitrarily destroy or divest actually existing individual property rights acquired under a former statute or agreement*." (Emphasis added.)

See also *Fletcher v. Peck*, 10 U.S. (6 Cr.) 87 (1810) wherein the court held rights vested under prior acts cannot be divested.

Therefore any contention by Defendants that some federal statute enacted subsequent to 1854-1886 provided for divestment or destruction of the "permanent homes" allotment/patent status as understood by the treaty signors in connection with consistent applicable treaty language would be invalid as arbitrary in violation of the 5th Amendment guarantee of due process law.

FEB 22 1991
OFFICE OF THE CLERK

(2)

No. 90-1162

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1990

SILAS V. CROSS, VERNON CROSS,

Petitioners,

v.

STATE OF WASHINGTON; HON. BOOTH GARDNER; BRIAN BOYLE, COMMISSIONER OF PUBLIC LANDS, [Washington State University, its Board of Regents and Secretary],

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. When an Indian treaty and subsequent legislation expressly authorize the sale of allotment land, do individual Indians have a right to recover title to allotment land sold by a relative in 1938 to a good-faith, non-Indian purchaser?

2. Is a claim by individual Indians that an act of Congress is an unconstitutional deprivation of a treaty right to allotment land barred for failure to join the United States pursuant to 25 U.S.C. § 345?

3. Are claims by individual Indians to patented allotment land sold by a relative in 1938 subject to state law defenses pursuant to 25 U.S.C. § 347?

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SILAS V. CROSS, VERNON CROSS,

Petitioners,

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STATE OF WASHINGTON; HON. BOOTH GARDNER; BRIAN BOYLE, COMMISSIONER OF PUBLIC LANDS, [Washington State University, its Board of Regents and Secretary],

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents State of Washington; Hon. Booth Gardner; Brian Boyle, Commissioner of Public Lands; Washington State University, its Board of Regents, and its

Secretary,[1] respectfully request the Court to deny the Petition for Writ of Certiorari seeking review of the Ninth Circuit Court of Appeals opinion in this case.[2] That opinion is reported at 911 F.2d 341 (1990).

STATEMENT OF FACTS

Given petitioners' approach to stating the facts in their petition we are compelled to provide a restatement of the facts.

The Puyallup Indian Reservation was created by the Medicine Creek Treaty of 1854. 10 Stat. 1132. The Reservation was enlarged by Executive Order following the Fox Island Conference of 1856. The Medicine Creek Treaty provides in Article 6 for allotment of reservation land to individual Indians. (Appendix A-1.) (Article 6 of the Treaty with the Omahas, referred to therein, is set out in Appendix A-1-2.)

In 1884, Congress provided for the survey of the Puyallup Reservation for the purpose of assigning lots to individual Indians or families. 23 Stat. 76. (Text of key statutes is in Appendix A.) Petitioners' ancestor, Jimmie Cross, received a patent from the United States for land allotted to him pursuant to Article 6 of the Treaty of Medicine Creek. (Pet., Appendix A-64-5.)

Shortly thereafter, Congress enacted the General Allotment Act of 1887, 24 Stat. 388, which authorized the allotment of other Indian land throughout the United States. The Act also established the practice of setting a limit, then 25 years, on restrictions on alienation of lands allotted pursuant to the Act. (Now codified, as amended, in 25 U.S.C. § 331 *et seq.*)

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[1]Respondents agree that the Ninth Circuit caption is incorrect. *See* Pet. 1.

[2]Respondents believe that the Petition for Writ of Certiorari has not been perfected within the time required to properly invoke the jurisdiction of this Court. Rule 13; 28 U.S.C. § 2101(c). The judgment of the Ninth Circuit Court of Appeals was entered August 15, 1990. The Petition was not perfected until February 4, 1990, when it was served on Respondents. At the time this brief was written, this issue was before the clerk of the court pursuant to Rule 13.3.

In 1893, Congress limited alienation restrictions on allotments to Puyallup Indians to ten years from the date of the legislation. 27 Stat. 633. In 1904, Congress acknowledged the expiration of that ten-year restriction period and confirmed that the restrictions on alienation of land allotted to Puyallup Indians were now removed. 33 Stat. 565.

Earlier, the Washington State Legislature, pursuant to Article 6 of the Omaha and Medicine Creek treaties, empowered Indians to alienate allotted lands. The Washington Act was to take effect after the removal of all restrictions on alienation by the Congress of the United States. 1890 Wash. Laws 499-501.

The essential facts regarding chain of title are not in dispute. (Pet. 6-7, A-72-3.) Beginning in 1919, a series of transactions occurred with respect to the Jimmie Cross patented land, including transfer by probate and warranty deeds. As a result of this series of transactions, the patented property was eventually included in the estate of Jimmie Cross, and upon his death his interest in the property was distributed in 1932, one-half each to surviving sons, Silas and George Cross.

In 1938, George Cross and his wife conveyed two parcels to Ben L. Andre, a non-Indian. In 1941, Ben L. Andre conveyed these two parcels to the state of Washington. These 1938 transactions are the focus of petitioners' ejectment claim. (CR 8, Amended Complaint, para. 3.2, pp. 19-20.)

Since 1941, the subject property has been used by Washington State University as part of an agricultural research station. Washington State University conducts important research at this facility that would be severely curtailed if the land is lost. (CR 39.)

This lawsuit was filed August 12, 1988, some 84 years after all restraints on alienation of the Cross patent were removed by Congress, and 47 years after it was acquired by the State for use by Washington State University. Petitioners and their relatives have lived adjacent to the Washing-

ton State University property over this entire period. (CR 8, Amended Complaint, para. 2.8 and 2.14, pp. 9-10, 12.)

REASONS WHY THE PETITION SHOULD BE DENIED

I. Petitioners' Arguments Are Contrary to the Treaty, the Statutes and the Law.

A. The Treaty of Medicine Creek Contemplates the Eventual Alienation of Allotted Land.

The Treaty of Medicine Creek of 1854 provides for the allotment of land reserved to the Puyallup Tribe to individual Indians and the possible alienation of such lands. Article 6 of the Medicine Creek Treaty incorporates Article 6 of the Treaty with the Omaha. 10 Stat. 1043. The relevant language in the Medicine Creek Treaty states:

> And he [the President] may further, at his discretion, cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. * * *

Article 6 of the Omaha Treaty states:

> And the President may, at any time, in his discretion, after such person or family has made a location upon the land assigned for a *permanent home*, issue a patent to such person or family for such assigned land, conditioned that the tract shall not be aliened or leased for a longer term than two years; and *shall be exempt from levy, sale or forfeiture, which conditions shall continue in force, until a State constitution embracing such lands within its boundaries, shall have been formed, and the legislature of the State shall remove the restrictions.* * * *

(Emphasis added.)

Petitioners argue that use of the term "permanent home" in the Medicine Creek Treaty precludes any interpretation of the treaties which would permit the eventual sale, or alienation, of allotments. Pet. 11-17. Petitioners' argument, however, ignores the clear language of the treaties.

The term "permanent home" is used in both Article 6 of the Treaty of Medicine Creek and the incorporated provisions of the Omaha Treaty. Petitioners argue at length that the restrictions on "aliening" or "leasing" in Article 6 of the Omaha Treaty show no intent to allow the sale, or alienation, of allotments. Pet. 7-11. They neglect to address, however, the succeeding clause of the same sentence in Article 6 of the Omaha Treaty which allows for the *sale* of allotments once restrictions are removed by a state legislature.[2] Obviously, use of the term "permanent home" in the treaties was not viewed as being inconsistent with the possible eventual sale of the allotments. Clearly, it was contemplated by the parties to the treaty that allotments could eventually be sold.

Ambiguous treaty language is to be construed in favor of the Indians. However, clear expressions of intent must be given effect. *DeCoteau v. District County Court*, 420 U.S. 425 (1975). From both the language of the treaties and the interpretation given to them by Congress, discussed below, it is clear that the eventual alienation of allotment lands was fully contemplated.

B. The Patent to Jimmie Cross Conveyed Fee Title Subject Only to Legislative Removal of Restrictions on Alienation.

Petitioners argue that the patent to Jimmie Cross conveyed only a right of use and occupancy in the land, not fee title which could be sold. Pet. 12, 14-15. They are wrong.

The nature of the patents to Puyallup Tribal members was determined in *United States v. Kopp*, 110 F. 160 (W.D.

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[2]This was done by Washington State in 1890. 1890 Wash. Laws 499-501.

Wash. 1901), not long after these patents were issued. There the court held, at 165:

> [E]ach patent conveyed a title in fee simple, subject to forfeiture upon conditions subsequent, and with a restriction upon the right of alienation for a period to be determined by future legislative enactments.

The *Kopp* court specifically rejected the contention that the United States continued to hold the allotted lands in trust. 110 F. at 165-6.

Eells v. Ross, 64 F. 417 (9th Cir. 1894), did not hold, as petitioners assert, that the Puyallup Reservation allotments could not be sold. Pet. 15-16. The court only held that until the restraints on alienation imposed by the General Allotment Act of 1887 expired, allotments were subject to some federal control.[3] At page 420, the court stated:

> From its relations to the title, and from the terms of the treaty, we think the government had the power to make such conditions, and that they were not destroyed by making the Indians citizens. Such effect cannot be deduced from the act of 1887, for, if congress could do so, congress did explicitly clog the title with a condition of non-alienation for 25 years, and absolutely nullified all contracts made, touching the same, before the expiration of such time.

As noted in *Kopp*, quoted above, several restrictions on alienation were attached to patents issued to Puyallups such as Jimmie Cross. As discussed below, all of these restrictions were removed by 1904. Removal of restraints vests fee title to an allotment. *See United States v. Waller*, 243 U.S. 452 (1917).

C. Congress Expressly Removed Any Restraints on Selling Land Allotted to Puyallup Indians.

The provisions incorporated into the Medicine Creek Treaty regarding allotments and their alienation have sev-

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[3] 27 Stat. 633 changed to ten years the limitation on alienation of allotments to Puyallup Indians.

eral times been supplemented and amended by Congress. The General Allotment Act of 1887, 24 Stat. 388, established the policy of setting limited restraints on alienation of allotted lands, there 25 years. Congress was more liberal with respect to lands allotted to Puyallup Indians.

In 1893, Congress limited restraints on alienation of allotments to Puyallup Indians to ten years from the date of the legislation, 27 Stat. 633. In relevant part, 27 Stat. 633 provides:

> *And provided further*, That the Indian allottees shall not have power of alienation of the allotted lands not selected for sale by said Commission for a period of ten years from the date of passage of this act and no part of the allotted land shall be offered for sale until * * * .

The expiration of this ten-year restriction was expressly recognized by Congress in 1904 and all restraints on alienation were removed. 33 Stat. 565. It is quite clear from this series of statutes that Congress intended with respect to members of the Puyallup Tribe that land originally allotted as permanent homes could be sold.[4]

Over the years, the courts have consistently recognized the legitimacy of the sale of allotment land to non-Indians. *See, e.g., Blake v. Arnett*, 663 F.2d 906, 911 (9th Cir. 1981). *See also Montana v. United States*, 450 U.S. 544, 559 (1981); *Brendale v. Confederated Yakima Indian Nation*, ___ U.S. ___, 109 S. Ct. 2994, 3010-11 (1989).

The fact that much of the Puyallup Reservation has been sold to non-Indians is well recognized. In *United States v. Kopp, supra*, at 110 F. 165, the court observed in 1901 that a "considerable part of the reservation" had been sold under the terms of the 1893 Act, 27 Stat. 633. In *Puyallup Tribe v. Department of Game*, 433 U.S. 165 (1977), at 174, this Court recognized:

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[4]Petitioners assert that the 1938 sale of the allotment land to a non-Indian was technically defective in that it was not approved by the Puyallup Land Commission pursuant to 27 Stat. 633. Pet. 21. The Commission was abolished, however, in 1896. 29 Stat. 341. The Act of 1904 removed all restrictions on alienation of allotments. 33 Stat. 565.

> Article II of the Treaty of Medicine Creek provided that the Puyallup Reservation was to be "set apart, and, so far as necessary, surveyed and marked out for their exclusive use" and that no "white man [was to] be permitted to reside upon the same without permission of the tribe and the superintendent or agent." It is argued that these words amount to a reservation of a right to fish free of state interference. Such an interpretation clashes with the subsequent history of the reservation and the facts of this case. *Pursuant to two Acts of Congress, 27 Stat. 633, and c. 1816, 33 Stat. 565, the Puyallups alienated, in fee simple absolute, all but 22 acres of their 18,000-acre reservation.* * * *

(Emphasis added.)

Puyallup Tribe v. Port of Tacoma, 717 F.2d 1251 (9th Cir. 1983), *cert. denied*, 465 U.S. 1049 (1984), also recognized that the allotments conveyed title to the individual Indians and that most of the Puyallup reservation has been sold. 717 F.2d at 1254.

Petitioners argue that 27 Stat. 633 (1893), limiting alienation restrictions to ten years, does not apply to patented lands, but only to land not needed for permanent homes. Pet. 17-19. This simply is inconsistent with a careful reading of the statute. The statute provides that allotment land not selected for immediate sale by the Puyallup Indian Commission could be alienated after ten years. Petitioners' assertions here are also contrary to how the statute was interpreted both in 1901 in *Kopp* and in the more recent *Puyallup Tribe* cases cited above.

D. Congress Was Well Within Its Power to Remove Restraints on Alienation of Puyallup Allotments.

The language of the Medicine Creek Treaty, the subsequent legislative acts, and the actual sale of most of the Puyallup Reservation demonstrate the intent that allotted lands could eventually be sold. Even if the legislative acts which permitted the alienation of land allotted to Puyallup Indians are inconsistent with the Treaty, as petitioners ar-

gue they are, Congress can unilaterally change treaties. *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977). The Congressional acts specifically allowing alienation of lands allotted to Puyallup Indians show clear Congressional intent to permit such transactions.

The removal of restrictions on alienation by Congress is not a violation of the Fifth Amendment to the U.S. Constitution as petitioners contend. Pet. 22-23. Indian allottees received greater use of their property, not less. *Choate v. Trapp*, 224 U.S. 665 (1912), does not support petitioners' argument, Pet. 22, that it is unconstitutional for Congress to remove restraints on alienation. Rather, the court held that Congress, dealing with tribes in Oklahoma, could remove restraints on alienation, allowing allotment land to be sold. What the court held to be improper was the removal of tax exemption status at the same time. 244 U.S. at 568.

Contrary to the assertions of the petitioners, both the Treaty of Medicine Creek and subsequent federal legislation allowed the sale of the subject property. The chain of title is not in dispute. The Ninth Circuit Court of Appeals correctly affirmed the ruling of the district court that the State of Washington is the legal owner of the subject property.

II. The United States Is a Necessary Party Which Cannot Be Joined.

Petitioners argue that if their interpretation of 27 Stat. 633, limiting restraints on alienation of Puyallup allotments to ten years, is not correct, then that statute is an unconstitutional impairment of a vested right. Pet. 22-23. They now allege that they were deprived of their property rights by "illegal U.S. Government means and devises . . . ." Pet. 3.

The Ninth Circuit did not need to deal with the issue of whether the United States is a necessary party. It, as did the district court, squarely rejected petitioners' argument

that removal of restraints on alienation is an unconstitutional impairment of rights. 911 F.2d at 345; Pet. A-24, A-30. However, petitioners are faced with the dilemma that if they are correct, the United States is a necessary party. 25 U.S.C. § 345. (Appendix A-6.) The United States cannot be joined, however, because any statute of limitations has long since run. *Wardle v. Northwest Investment Co.*, 830 P.2d 118 (8th Cir. 1987). Further, this is in effect a takings claim, one which cannot be brought directly against the United States. *See United States v. Mottaz*, 476 U.S. 834 (1986).

Petitioners seek to circumvent their failure to join the United States below by serving a copy of their petition upon the Solicitor General, purporting to be merely complying with Rule 29.4(b). Pet. 26. This, however, does not cure their error.

III. Petitioners' Claims Are Time Barred.

Assuming that there could be a legal basis for petitioners' claims, their claims are subject to state law defenses. 25 U.S.C. § 347. (Appendix A-6-7.)

It was not necessary for the Ninth Circuit to consider these defenses. 911 F.2d at 345, Pet. A-24-5. This Court may, of course, affirm on any issue raised below. *Dowridge v. Williams*, 397 U.S. 491, 496 n.6 (1970). Petitioners' challenge to the 1938 sale is barred by Washington State's ten-year statute of limitations for actions of this nature. Revised Code of Washington 4.16.020(1). (Appendix A-7.)

Petitioners' claims are barred by adverse possession. They and their relatives have lived adjacent to the Washington State University property since the initial allotment. *See Begay v. Albers*, 721 F.2d 1274, 1279 (10th Cir. 1983); *Chaplin v. Sanders*, 100 Wn.2d 853, 676 P.2d 431 (1984).

Petitioners' claims are barred by laches. They offer no explanation for bringing this action 50 years after the property was sold. *See Lemieux v. United States*, 15 F.2d 518 (8th Cir. 1926); *Little Bill v. Swanson*, 64 Wash. 650, 117 P. 481 (1911).

CONCLUSION

For the reasons given above, the Petition for a Writ of Certiorari should be denied.

DATED this 22nd day of February, 1991.

Respectfully submitted,

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APPENDIX

TREATY PROVISIONS

Medicine Creek Treaty of 1854 (10 Stat. 1132)

ARTICLE VI

The President may hereafter, when in his opinion the interests of the Territory may require, and the welfare of the said Indians be promoted, removed them from either or all of said reservations to such other suitable place or places within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of their removal, or may consolidate them with other friendly tribes or bands. And he may further, at his discretion, cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indian, and which he shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President, and payment be made accordingly therefor.

Treaty With the Omahas of 1854 (10 Stat. 1043).

ARTICLE 6

The president may, from time to time, at his discretion, cause the whole or such portion of the land hereby reserved, as he may think proper, or of such other land as may be selected in lieu thereof, as provided for in article first, to be surveyed into lots, and to assign to such Indian or Indians of said tribe as are willing to avail of the privilege, and who will locate on the same as a permanent home, if a single person over twenty-one years of age, one-eighth of a section; to each family of two, one quarter section; to each family of three and not exceeding five, one half section; to each family

of six and not exceeding ten, one section; and to each family over ten in number, one quarter section for every additional five members. And he may prescribe such rules and regulations as will insure to the family, in case of the death of the head thereof, the possession and enjoyment of such permanent home and the improvements thereon. And the President may, at any time, in his discretion, after such person or family has made a location on the land assigned for a permanent home, issue a patent to such person or family for such assigned land, conditioned that the tract shall not be aliened or leased for a longer term than two years; and shall be exempt from levy, sale or forfeiture, which conditions shall continue in force, until a State constitution, embracing such lands within its boundaries shall have been formed, and the legislature of the State shall remove the restrictions. And if any such person or family shall at any time neglect or refuse to occupy and till a portion of the lands assigned and on which they have located, or shall rove from place to place, the President may, if the patent from such person or family have been issued, cancel the assignment, and may also withhold from such person or family, their proportion of the annuities or other moneys due them, until they shall have returned to such permanent home, and resumed the pursuits of industry; and in default of their return the tract may be declared abandoned, and thereafter assigned to some other person or family of such tribe, or disposed of as is provided for the disposition of the excess of said land. And the residue of the land hereby reserved, or of that which may be selected in lieu thereof, after all of the Indian persons or families shall have had assigned to them permanent homes, may be sold for their benefit, under such laws, rules or regulations, as may hereafter be prescribed by the Congress or President of the United States. No State legislature shall remove the restrictions herein provided for, without the consent of Congress.

FEDERAL STATUTES INVOLVED

23 Stat. 76, 88-89. Appropriation Act of July 4, 1884.

Three thousand dollars or so much thereof as may be necessary to enable the President to cause to be surveyed such portion of the Puyallup Reservation in Washington Territory into lots as he may deem advisable and direct, and the same assigned to such individual Indians or families of such reservation as are willing to avail themselves of the privilege and will locate on the same as permanent homes in accordance with the terms of Article VI of the Treaty made on December twenty-sixth, eighteen hundred and fifty-four, and ratified by the Senate March third, eighteen hundred and fifty-five.

27 Stat. 633. Puyallup Indian Commission Act of March 3, 1893.

That the President of the United States is hereby authorized immediately after the passage of this act to appoint a commission of three persons, and not more than one of whom shall be a resident of any one State, and it shall be the duty of said commission to select and appraise such portions of the allotted lands as are not required for homes for the Indian alotees; and also that part of the agency tract, exclusive of the burying ground, not needed for school purposes, in the Puyallup Reservation, in the State of Washington. And if the Secretary of the Interior shall approve the selections and appraisments made by said commission, the allotted lands so selected shall be sold for the benefit of the allottees, and the agency tract for the benefit of all the Indians, after due notice at public auction at not less than the appraised value for cash, or one-third cash, and the remainder on such time as the Secretary of the Interior may determine, to be secured by vendor's lien on the property sold.

It shall be the duty of said commission, or a majority of them, to superintend the sale of said lands, ascertain who are the true owners of the allotted lands, have guardians duly appointed for the minor heirs of any deceased allottees, make deeds of the lands to the purchasers thereof, subject

to the approval of the Secretary of the Interior, which deeds shall operate as a complete conveyance of the land upon the full payment of the purchase money; and the whole amount received for allotted lands shall be placed in the Treasury to the credit of the Indian entitled thereto and the same shall be paid to him in such sums and at such times as the Commissioner of Indian Affairs, with the approval of the Secretary of the Interior, shall direct: *Provided*, That the portion of the agency tract selected for sale shall be platted into streets and lots as an addition of the City of Tacoma, and sold in separate lots, in the same manner as the allotted lands, and the amount received therefor, less the amount necessary to pay the expenses of said commission, including salaries shall be placed to the credit of the Puyallup band of Indians as a permanent school fund to be expended for their benefit: *And provided further*, That the Indian allottees shall not have power of alienation of the allotted lands not selected for sale by said Commission for a period of ten years from the date of the passage of this act and no part of the allotted land shall be offered for sale until the Indian or Indians entitled to the same shall have signed a written agreement consenting to the sale thereof, and appointing said commissioners, or a majority of them, trustees to sell said land and make a deed to the purchaser thereof; and no part of the agency tract shall be sold until a majority of said Indians shall consent thereto in a written agreement, which shall also constitute said commissioners, or a majority of them, trustees to sell said land, as directed in this act, and make deeds to the purchaser for the same. The deeds executed by said commission shall not be valid until approved by the Secretary of the Interior, who is hereby directed to make all necessary regulations to carry out the purposes of the foregoing provisions. The proceeds arising from the sale of the allotted lands shall be placed in the Treasury to the credit of the respective allottees, and the net proceeds of the agency tract, after paying the expenses of said commission in the appraisment and sale of said lands, and reimbursing the United States for the amount advanced to said commission, shall be placed in the Treasury of the United States to

the credit of all said Indians, and the said sums shall draw interest at the rate of four per centum per annum, and the income shall be annually expended for the benefit of said Indians, under the direction of the Secretary of the Interior: *Provided*; That an amount not exceeding one tenth of the principal sum may be expended for their benefit during any fiscal year, if deemed necessary by the Secretary of the Interior: *Provided further*, That the entire expense herein incurred shall be apportioned by the Secretary of the Interior pro rata between the several allottees and the owners of the tribal tract; and the Secretary of the Interior may in his discretion designate one member of said Commission to superintend the execution of any of the requirements of said Commission herein provided for.

And the sum of twenty thousand dollars or so much hereof as may be necessary, is hereby appropriated for the purpose of defraying the expenses of said commission, to be reimbursed to the United States out of the proceeds of the sale of that portion of the agency tract, to be reimbursed to the United States out of the proceeds of the sale of that portion of the agency tract, to be immediately available.

33 Stat. 565. Act Confirming Removal of Restrictions Upon Alienation of Puyallup Indian Allotted Land of April 28, 1904.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act of Congress approved March third, eighteen hundred and ninety-three (Twenty-seventh Statutes, page six hundred and thirty-three), authorizing the sale of the Puyallup allotted lands, with restriction upon alienation "for a period of ten years from the date of the passage" thereof, shall be taken and construed as having expressed the consent of the United States to the removal of restriction upon alienation by said Puyallup Indians to their allotted lands from and after the expiration of said period shall be given effect of having been made without any restrictions upon the power of the allottee to alienate his land.

25 U.S.C. § 345

All persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment Act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper district court of the United States; and said district courts are given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty (and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant); and the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him, but this provision shall not apply to any lands now held by either of the Five Civilized Tribes, nor to any of the lands within the Quapaw Indian Agency: *Provided*, That the right of appeal shall be allowed to either party as in other cases.

25 U.S.C.§ 347

In all actions brought in any State court or United States court by any patentee, his heirs, grantees, or any person claiming under such patentee, for the possession or rents or profits of lands patented in severalty to the members of any tribe of Indians under any treaty between it and the United States of America, where a deed has been approved by the Secretary of the Interior to the land sought to be recovered, the statutes of limitations of the States in which said land is situate shall be held to apply, and it shall be a complete defense to such action that the same has not

been brought within the time prescribed by the statutes of said State the same as if such action had been brought for the recovery of land patented to others than members of any tribe of Indians.

STATE STATUTES INVOLVED

1890 Wash. Laws 499

The said Indians who now hold, or who may hereafter hold, any of the lands of any reservation, in severalty, located in this state by virtue of treaties made between them and the United States, shall have power to lease, incumber, grant and alien the same in like manner and with like effect as any other person may do under the laws of the United States and of this state, and all restrictions in reference thereto are hereby removed.

All deeds, conveyances, encumbrances or transfers of any nature and kind executed by any Indian, or in any manner disposing of any land, or interest therein, shall be by deed executed in the same manner as prescribed for the execution of deeds conveying real estate, or any interest therein, except that the same shall in all cases be acknowledged before a judge of a court of record. In taking said acknowledgment, the said judge shall explain to the grantor the contents of said deed or instrument, and the effect of the signing or execution thereof, and so certify the same in the acknowledgment, and before the same shall be admitted to record shall duly examine and approve the said deed or other instrument.

This act shall take effect and be in force from and after the consent to such removal of the restrictions shall have been given by the congress of the United States.

RCW 4.16.020(1)

For actions for the recovery of real property, or for the recovery of the possession thereof; and no action shall be maintained for such recovery unless it appears that the plaintiff, his ancestor, predecessor or grantor was seized or possessed of the premises in question within ten years before the commencement of the action.